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IN THE

Supreme Court of the United States

October Term, 1962

No. 1240

IN THE MATTER

OF

SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN-FINCH PETRO CHEMICAL CORPORATION,

Debtors.

—o—

PETER JAKOBSON,

Petitioner,

AGAINST

GEORGE C. LEVIN and JAMES HALLISEY, Trustees of SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY and SWAN-FINCH PETRO CHEMICAL CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETER JAKOBSON,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Peter Jakobson, respectfully prays that a writ of certiorari issue to review an order and judgment of the United States Court of Appeals for the Sec-

ond Circuit which was entered January 16, 1963, and which affirmed an order of the United States District Court for the Southern District of New York dated November 7, 1962 appointing John F. Kelly Temporary Receiver of a parcel of real estate located in the City of New York and known as 1050 Park Avenue, as well as of the rents and income thereof. An application duly and timely made by petitioner for a rehearing of the said order was denied by the Court of Appeals on February 13, 1963.

Opinions Below

The opinion of Judge Palmieri of the District Court was dated November 7, 1963. A *per curiam* opinion of the Court of Appeals for the Second Circuit affirming Judge Palmieri's order, was filed January 16, 1963 and the order denying the petition for rehearing was filed on February 13, 1963. The opinion of the District Court is reported in 213 Fed. Supp. 638 and the opinion of the Court of Appeals is reported in 313 F. (2d) 140. Copies of these opinions are printed in the Appendix attached to this petition.

Proceedings in the Court Below

The Court of Appeals for the Second Circuit directed argument of the appeal in this case without record, briefs or appendix.

Jurisdiction

The order and judgment of the United States Court of Appeals for the Second Circuit, sought to be reviewed, was entered on November 7, 1962—rehearing denied Feb-

ruary 13, 1963. Jurisdiction to issue the writ requested is found in Section 24(c) of the Bankruptcy Act and in Title 28, United States Code, Section 1254(1).

Statutes and Federal Rules of Civil Procedure Involved

1. Bankruptcy Act.

2. Federal Rules of Civil Procedure, particularly Rule 65(c).

Questions Presented

Trustees appointed in a Bankruptcy Court reorganization proceeding obtained *ex parte* leave to commence a plenary action to assert title to certain real property once allegedly belonging to a former officer of the corporations in reorganization. The sole basis for the suit was that the former president of the corporation had allegedly looted the corporation and that the Respondent Trustees had claims against him; that there was a strong suspicion that such president owned some undefined interest in the real estate; and that the Respondent Trustees, in order to protect that interest to be able to collect any judgment recovered against this former president, were entitled to the appointment of a Receiver of the entire property. After serving the summons and complaint in the plenary action on only the net lessee (Petitioner herein) of the record owner, the Trustees asked for the appointment of the Receiver. The Bankruptcy Court appointed the Receiver despite the absence of valid service, personal or substituted, upon the record owner or on the former President of the reorganizing corporations whose debtor he is alleged to be, and without regard to the outstanding interests of the net lessee in the property.

The questions presented include the following:

1. Whether the court may, on a motion without trial, appoint—in a plenary suit brought by the Respondent Trustees alleging fraudulent conveyance against future creditors by the former president of the debtor corporations—a Receiver of real property without requiring a bond or other security on the part of the Respondent Trustees in order to protect the interest of the *bona fide* net lessee then occupying the property, particularly when said real estate is admitted to have never been owned by such debtor corporations or even by the president charged with the unlawful acts.

2. Whether the summary disposition by a Court of Appeals which rejected the appeal from the order of the District Court solely on the grounds that it would not interfere with the continuing actions of the bankruptcy court—since to do so would render futile and nugatory the lower court's action—was a proper exercise of appellate review power.

3. Whether the Court, acting either as a bankruptcy court or in support of a plenary action, could under relevant Federal and State procedures appoint a Receiver in a case where an attack is made upon a transfer allegedly in fraud of creditors without more than mere allegations concerning a minority interest in the property involved in the chain of title by the former president of the debtor corporations and without service of process on the record owner of the property.

Reasons for Granting the Writ

The instant proceeding involves a basic conflict among the Courts of Appeal with respect to the application of Rule 65 (e) of the Federal Rules of Civil Procedure regarding the manner of the grant of relief in this matter. The manner in which appellate review by the Court of Appeals was conducted should serve equally as a cause for review to insure uniformity of judicial administration at the appellate level. Finally, there is a basic question concerning the extent of the power of District Courts sitting as bankruptcy courts, and review should, therefore, be granted as part of the supervisory power of this Court over such proceedings.

Summary Statement of the Matters Involved

Petitioner Jakobson was, under a written agreement made in March, 1962, the net lessee of a luxury apartment building located in Manhattan. Under the terms of his lease with the owner of the property, one Herbert Birrell, Jakobson was required to pay a stipulated net monthly rental and to assume the operating responsibility for the building. His financial responsibility was unlimited and provision was made for additional remuneration (and additional rent to the Lessor) in the event that Petitioner was able to increase the rental income in the rent-controlled building.

Title to the building itself had been acquired by Herbert Birrell ("Herbert"), the record owner-lessor, in 1951. Prior to that time it had been owned by Ruby Trading Corporation ("Ruby"), a New York corporation in which the Lessor, his brother (Lowell Birrell) and two other individuals were equal partners.

No less than three years after the conveyance to Herbert, Lowell Birrell ("Lowell") allegedly conceived and undertook a plan in 1955 to defraud the stockholders and creditors of certain corporations for which the respondent Trustees were and presently are Trustees in reorganization.

The Trustees obtained *ex parte* leave from District Judge Edmund Palmieri to commence a plenary suit against persons appearing in the chain of record title of the property to set aside all prior conveyances and to apply any proceeds from such suit to the alleged debt of Lowell to the reorganized corporations. Leave was granted and a summons and complaint filed. The summons and complaint were served only upon the net lessee, Petitioner herein. No one else has ever been validly served.

Before any answer had been interposed, the Trustees sought the appointment of a Receiver with respect to the property which request was made by Order to Show Cause addressed to the Petitioner lessee and to the record owner: service was effected, however, only upon the Petitioner (net lessee). No attempt was made to effect service of the summons and complaint in accordance with the provisions of the Civil Practice Act of New York for substituted service with respect to real estate located in New York. The Trustees requested the appointment of the receiver to safeguard the property, which, they claimed, rightfully belonged to Lowell, debtor of the reorganized corporations, and should be made available to the stockholders and creditors of those corporations. The Trustees claimed that the transfer of the property from Lowell to Ruby in 1944 and from Ruby, the corporation in which Lowell was a 25% owner, to Herbert in 1951 were all part of Lowell's scheme to loot the reorganizing

corporations which it is claimed Lowell conceived in 1955—at least four years before the reorganization proceedings herein were filed.

Following the appointment of the receiver and while an appeal from the order of appointment was pending, the Trustee-Respondents discontinued the pending plenary action as against the Petitioner net lessee, the sole defendant in the plenary action actually served with process, leaving no party defendant then served in said action.

No claim was made by the Trustee-Respondents that the property was at any time an asset of the reorganized corporations or that it was purchased with any property belonging to the reorganized corporation. The Trustee-Respondents based their request for leave to commence suit and for the receiver solely on unsupported allegations that Herbert, the record owner, was the nominee of his fugitive brother, Lowell.

The receiver entered upon the property and shortly thereafter notified the Petitioner net lessee that his interest in the property was terminated pursuant to the terms of the lease and thereby disaffirmed the same. No provision was made in the order of appointment of the receiver for the safeguarding of the profits to which Petitioner net lessee might have become entitled had he been permitted to continue his operation of the property.

Petitioner net lessee sought a stay pending appeal of the assumption of the control of the property by the receiver in the Court of Appeals for the Second Circuit. On the return of the motion, the Court directed that the appeal itself be heard forthwith on the same day. The appeal was argued but no written briefs or other printed matter were ever submitted. The Court of Appeals affirmed the Court below and subsequently denied a petition for rehearing.

POINT I

The opinion below erred in failing to give adequate protection to Petitioner as a *bona fide* obligee. The failure to give such protection raises an important question regarding the application of the Federal Rules of Civil Procedure. On that point there is a conflict among the Second, Third and Seventh Courts of Appeal.

Trustee-Respondents did not contest below that Petitioner-lessee was not involved in whatever nefarious motives they sought to ascribe to Lowell Birrell. No question was raised, therefore, as to the protection that Petitioner-lessee should have received as a *bona fide* obligee. The opinions below, however, made no provision for such protection.

This failure of protection is pointed up in one area in which the Circuits are in disagreement and in which this Court has once granted a writ of certiorari. It is respectfully submitted that the instant case raises, in addition to the issues already enumerated, substantially similar problems to the case in which certiorari was once deemed appropriate.

In *Helpert v. Engine Air Service, Inc.*, 212 F. 2d 860 (2d Cir. 1954), cert. granted, 348 U. S. 854 (1954), the writ was withdrawn by stipulation of the parties. That case held that Rule 65(c) which normally requires the posting of bond in order to grant injunctive or other extraordinary relief was not applicable to a plenary action by a Trustee in Bankruptcy. The Second Circuit noted its own disagreement with the Seventh Circuit which in *Chatz v. Freeman*, 204 F. 2d 764 (7th Cir. 1953) held Rule 65(c) requiring bond applicable to such proceedings. Strangely, however, the Second Circuit did not deal with previous holdings in its own Court which held that Rule 65(c) did

apply and were in line with the Seventh Circuit holding. *I & I Holding Corporation* v. *Greenberg*, 151 F. 2d 570 (2d Cir. 1945), cert. denied, 327 U. S. 781 (1945); *Perlman* v. *322 West Seventy-Second Street Co.*, 127 F. 2d 716, 718 (2d Cir. 1942); *Korell* v. *New York Ambassador, Inc.*, 108 F. 2d 294 (2d Cir. 1939).

Another Court of Appeals, in the Third Circuit, called to rule on the same question, followed the Seventh Circuit and rejected the Second Circuit view—or that expressed by the last case. See *Ferguson* v. *Bucks County Farms, Inc.*, 280 F. 2d 739 (3d Cir. 1960).

This conflict of the Second, Third, and Seventh Circuits raises the basic question which should be reviewed and determined in this Court regarding the applicability of the Federal Rules of Civil Procedure to suits instituted by Bankruptcy court-appointed officials, Trustees and Receivers. The decision in *Ferguson* v. *Bucks County*, *supra*, points up the need for clarification in a manner particularly appropriate in the instant case. The decision in that case held the District Court in error for not having required under Rule 65(c) the posting of security in connection with a preliminary injunction but simultaneously found that the filing of bond by a receiver appointed by the District Court was adequate compliance with Rule 65(c). The court virtually overlooked the purpose of a receiver's bond which merely assures honest administration of the estate entrusted to him and compliance with future court orders. Such a bond is irrelevant to the need for security to protect the transferee or other party defendant whose property is seized by a court order at the behest of Trustee or Receiver. See Bankruptcy Act, §67d(6), 11 U. S. C. §107d(6); N. Y. Real Property Law, §266; N. Y. Personal Property Law, §40.

Certainly, a doctrine that Trustees are absolutely protected in whatever act they undertake, even without color or proven right, on behalf of their estates, should not be created by implication or default. Definitive determination can be made with respect to such a doctrine, if such exists, only by this Court's ruling regarding the applicability of the Federal Rules to bankruptcy matters. This case raises the issue squarely and is appropriate, therefore, for grant of certiorari.

POINT II

The order below raises serious questions regarding the power to appoint receivers in collateral proceedings which should be determined in this Court.

A serious supervisory problem of the lower courts is raised by the very opinion of the District Judge which granted the application for a Temporary Receiver. This interpretative question regarding the Bankruptcy Act is of far-reaching import for the courts implementing that Act. The weight of controlling authority would appear to limit the appointment of receivers to those situations set forth in Section 2(a)(3) of the Act, 11 U. S. C. 11(a)(3). The District Judge took the position that by virtue of Section 2(a)(15) of the Act, 11 U. S. C. 11(a)(15), and Section 2(b) of the Act, 11 U. S. C. 11(b), the District Court's power was virtually unlimited. By implication, the District Court extended this self-asserted unlimited power into the area of parallel plenary suits. Such suits, however, have already been distinguished by this Court from mere matters of administration under the Bankruptcy Act. *Cline* v. *Kaplan*, 323 U. S. 97. There is, in addition, authority which would sharply limit the power claimed in

the District Court. See 7 Moore, Federal Practice, para. 65.02(3), 65.09 (2d ed. 1954).

The Court of Appeals made no effort to review this question and, in view of the summary nature of the proceedings before it involving the argument of the appeal without briefs and on oral argument alone, could hardly have been expected to do so. The case raises, therefore, substantial questions involving the proper limits of appointing power in the District Court which should be reviewed by this Court.

A further aspect of the confusion regarding the District Court's power in this respect may be seen in Judge Palmieri's statement of his "serious reservations concerning Peter Jakobson's [Petitioner] standing to object to this [receivership] application" since "his contract [leasehold] is still in force" and "the receiver will step into the shoes of Herbert Birrell and one of his first obligations will be to appraise the business value of the Jakobson contract and take such action with respect to it as may be advised" (Appendix, p. 21).

Presumably the reference to an alleged lack of standing arose from the argument that Petitioner had given nothing for the leasehold contract and could not be harmed by the appointment of a receiver.

Such strange reasoning assumes that Petitioner undertook no substantial obligations. The converse is true, as Petitioner was required to operate the property and to incur debts for taxes, wages, materials, supplies and other miscellaneous items. If he was successful in operating this property, he stood to make a legitimate profit depending altogether on the success of his labors and diligence. The inclusion of such a reference in the District Judge's opinion points up the necessity for guidance and

supervision with respect to this area of power of the District Court.

The inclusion of such reasoning in Judge Palmieri's opinion suggests strongly that his determination and the affirmance of the Court of Appeals were dictated more by expediency and suspicion with respect to the transactions involving Lowell Birrell, no matter how remote these were from the date of the bankruptcy of the debtor corporations. Presumptions of fraud, however, cannot serve to create powers in the District Courts which they would not otherwise possess under the Bankruptcy Act.

POINT III

The Court of Appeals failed to afford proper review of the determination in the District Court.

The extent and manner of appellate review afforded by the Courts of Appeal is a principal consideration and concern in the supervision of the federal judicial system. The summary nature of the treatment of the appeal in the instant case and particularly the apparent grounds upon which the reviewing court made its determination should be matter of concern for this Court.

If the rationale of affirmance adopted by the Court of Appeals ("a reversal * * * might render nugatory and futile further action") were generally adopted, there would never be a reversal of any Bankruptcy Court determination and perhaps few appellate reversals at all.

From its opinion it would appear that the Court of Appeals failed to consider the several questions already outlined above. In addition, no consideration was evidently given to whether the order granted by Judge

Palmieri, an extraordinary and, by its nature, emergency remedy, was necessary under the circumstances. Where real property is involved, receivership does not seem appropriate or required to protect ultimate interests. *Kirsner* v. *Kirsner*, 257 App. Div. 840, 11 N. Y. S. 2d 993 (2d Dep't 1939); 7 Moore's Federal Practice, para. 66.05(1) (2d ed. 1955). The real relief which was sought by the Trustees was to *attach* the interest, whatever it may be, of Lowell Birrell in the premises. Nothing more could be involved. But instead, the drastic remedy of an overall receivership was granted—without bond or security. More appropriate relief would have been to require first of the Respondent Trustees some effort at undertaking the requisite showing and ultimate proof. The Court of Appeals, in its summary disposition, offered no guidance in this respect. In the interest of the administration of the bankruptcy laws in the federal courts and in the general interest of the adequate appellate supervision of District Courts, certiorari should be granted.

POINT IV

The order below raises substantial questions as to the applicable law in determination of bankruptcy Trustee rights.

As in the case of many federal relief provisions, the Bankruptcy Act does not stand alone in furnishing a guide to Trustee remedies. By its very terms, the Act focuses on the provisions of creditors' rights under local law. See Collier, Bankruptcy Manual, §70.48 (1962); 3 Remington, Bankruptcy, §1588, *et seq.* (1957). Thus, only if some remedy would normally be available to creditors under applicable local law can the Trustees sustain

a pending or attempted action under Section 70(e)(1) of the Act dealing with voidable transfers in a situation where the debtor or bankrupt never owned the property alleged to have been fraudulently transferred.

The appropriate approach and analysis to be used in applying these provisions of the Bankruptcy Act, therefore, will be important not only in the case at bar where the laws of New York are directly involved, but in each and every case involving reference to state law giving content to the federal directions.

In the instant case, the opinions below require extension of New York Debtor and Creditor Law provisions regarding fraudulent transfers far beyond anything that can be tortured from the statute and equally far beyond any reported state cases. The property to which claim is made was never owned or controlled by the corporations involved and clearly could not even remotely be said to form part of their estate in bankruptcy. Title was transferred, by Respondent Trustees' own allegations, before the allegedly looting officer, in the remote chain of title, had even allegedly conceived his plan to defraud the corporations in reorganization. The property was acquired by Ruby in 1944. It was transferred by Ruby to Herbert in 1951. Lowell allegedly commenced his plan to defraud in 1955. The plenary action was commenced in 1962—11 years after the alleged fraudulent transfer. N. Y. Debtor and Creditor Law, §276; N. Y. Stock Corporation Law, §15; N. Y. General Corporation Law, §§60, 61; *Doyle* v. *Gordon*, 158 N. Y. S. 2d 248 (Sup. Ct. N. Y. Co. 1954); *Gruenbaum* v. *Lissauer*, 57 N. Y. S. 2d 137 (Sup. Ct. N. Y. Co. 1945); *Henry* v. *First National Bank of Ardsley*, 110 N. Y. S. 2d 115 (Sup. Ct. Westchester Co. 1951).

Perhaps more significant, even from the point of view of the federal Act itself, is the fact that the Trustee-respondents, in requesting the appointment of a receiver, scarcely attempted to make a showing of the fraudulent attempt which would ultimately have to be proven to sustain their allegations. Not only was a "threshold level" of proof not met; it was not even alleged. *Cooper* v. *Maurer*, 37 N. Y. S. 2d 992 (1942); see also, *In re Campbell's Estate*, 164 Misc. 632, 299 N. Y. Supp. 442 (Surrog. Ct. N. Y. 1937). Whether a District Court can assert its power to appoint a receiver without even a colorable showing of that level of proven intent to defraud which is required by local law is a matter requiring determination by this Court to furnish necessary guidance to other District Courts.

CONCLUSION

For the reasons set forth hereinabove, it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX

Opinion of United States District Court, Southern District of New York

PALMIERI, J.

The Trustees, engaged in the reorganization of various corporate debtors pursuant to Chapter X of the National Bankruptcy Act, have moved for the appointment of a Receiver to manage and control certain property in New York City pending the determination of its ownership and of their right to recover damages. The property in question consists of a 14 story and penthouse apartment building located at 1050 Park Avenue in New York City.

The evidence submitted upon this motion by the Trustees justifies strong suspicion that this property has been partly owned if not controlled by Lowell Birrell, a fugitive from justice, presently reported to be residing in Rio de Janeiro, Brazil. The title to this property has been held by Herbert A. Birrell, a citizen of the United States, a lawyer, and a brother of Lowell Birrell. Herbert acquired title as a result of a corporate transfer planned and executed by Lowell in an apparently successful attempt to frustrate and defeat parties with financial claims against him. Herbert Birrell has for many years been associated with the business activities and enterprises of his brother Lowell and it is not improbable that his record ownership of this property has been a device for the protection and comfort of Lowell Birrell. Indeed, since the flight of Lowell Birrell to Brazil in 1959, to avoid prosecution for many crimes for which he stands

indicted.[1] Herbert Birrell has been making periodic payments to Lowell Birrell's wife, Merrie. These payments were made through one Hugh H. Begley, who has had a long association with Lowell Birrell and his enterprises. The monies paid to Mrs. Birrell have not, in her opinion, been sufficiently large and toward the end of 1961, she had a disagreement with Herbert Birrell which led her to make threats to the effect that if she did not receive more money, she would tell everything that she knew. Indeed, she has asserted rights of ownership in this property.

This disagreement between Herbert A. Birrell and Mrs. Lowell Birrell apparently precipitated a number of strange financial transactions with respect to this building. In December 1961 Herbert Birrell successfully applied for an increased first mortgage on the property in question in the sum of $1,100,000. The existing first mortgage on the property was in the sum of $442,734.94. An equivalent amount from the new first mortgage money was paid to the prior mortgagee to liquidate it. The balance of over $650,000 has disappeared and is beyond the control of this Court except for the sum of $50,000 which appears to have been reserved for alteration of the premises. The very substantial sums making up the balance of this first mortgage money were deposited in banks situated here and in various outlying jurisdictions, and in almost every instance each bank account was closed out a short time after the money was deposited. There was no apparent business reason for mortgaging this

[1] Lowell Birrell was indicted in what was then the New York State Court of General Sessions, New York County, charged with 69 counts of larceny in the first degree for the fraudulent manipulations and theft of securities and property of Swan-Finch. He has been similarly indicted for various serious charges involving fraudulent manipulation of assets and securities in the United States District Court, Southern District of New York, and in the Superior Court of the State of California, Los Angeles County.

property so heavily or for disposing of the funds in the manner indicated.

Contemporaneously with the conclusion of the mortgage transaction just described, Mr. Herbert Birrell moved from his penthouse apartment situated in the premises in question and departed for Canada. The Trustees attempted in vain to communicate with him over a period of several months and were never advised that his departure was final and irreversible. They were led to believe that he had departed for an extended hunting trip and it was only upon the argument that his attorneys appeared specially and took the position that Herbert Birrell had become a bona fide resident of Canada without any apparent intention of returning to this country. It was also stated by them that Herbert Birrell was contemplating a safari in Africa.

Upon departure from New York, Herbert Birrell transferred the management of the property to one Peter Jakobson, a tenant of the property, who is also in the real estate business. Although the form of written contract between Herbert Birrell and Peter Jakobson is that of a net lease, it is subject to cancellation upon 60 days' notice at the end of any month and upon the payment of $5,000 pursuant to a specified form of accounting. To all intents and purposes, Jakobson is the agent of Herbert Birrell.

There is little doubt, in view of the facts detailed above, that the appointment of a receiver would be appropriate if the Court possesses the power to grant this remedy. It has been asserted, however, primarily on the basis of Section 2(a)(3) of the Bankruptcy Act,[2] that such power is lacking. Section 2(a)(3) expressly authorizes appointment of a receiver to take charge of the bankrupt's prop-

[2] 11 U. S. C. §11(a)(3).

erty until the petition is dismissed or the trustee has qualified. It is claimed that the section by necessary implication precludes appointment of a receiver in a situation such as this in which the trustee has already qualified. This argument is made in spite of Section 2(a)(15),[3] which provides that the bankruptcy court may "Make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title;" and in spite of Section 2(b),[4] which provides that "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

To give Section 2(a)(3) such a restrictive effect represents an overly broad reading of that section, and an overly narrow interpretation of the powers accorded a district court by the Bankruptcy Act. The purpose of Section 2(a)(3) is to provide a means of conserving the bankrupt's property between the filing of the petition and either its subsequent dismissal or the appointment of a trustee.[5] Accordingly, the receiver is empowered to take charge of the property; to protect the interests of creditors; to prosecute or defend any pending suit; and to commence or prosecute suits of its own. The limitation that arises from the language "until . . . the trustee is qualified" is directed primarily to the situation in which the trustee has already been appointed and yet the receiver continues to assert its right to administer the estate. It would be unseemly if the receiver and the trus-

[3] 11 U. S. C. §11(a)(15).

[4] 11 U. S. C. §11(b).

[5] See 1 Collier on Bankruptcy, §2.24, at 209 (14th Ed. 1961).

tee, both allegedly acting in the interests of creditors and as officers of the court, were permitted to dispute with each other over administration of the bankrupt's estate. Exactly such a dispute was in prospect in the *Empire Finance* case[6] cited by counsel for Herbert Birrell, and was undoubtedly the reason for the holding that the bankruptcy court had no general equity power to appoint a receiver who would oppose certain facets of the trustee's administration.

In this case, however, it is the Trustees themselves who are asking for the Receiver. Thus, no danger of conflict is present. Furthermore, this application is not made in the context of overall administration of the bankrupt's affairs, as contemplated by Section 2(a)(3), but is solely to preserve a single piece of property now in the hands of a third party.

If more specific authority for this Court's power were needed, reference could be had to *Steelman* v. *All Continent Corp.*, 301 U. S. 278 (1937) and *In re Mitchell*, 278 Fed. 707 (2d Cir. 1922). The precise holding in *Steelman* was that a bankruptcy court possessed the power to enjoin a proceeding brought by a third party in another district court, when that proceeding would interfere with, indeed, severely frustrate, the bankruptcy action. In the course of the opinion, Justice Cardozo specifically suggested that a receiver could be appointed to manage and preserve the property involved pending the outcome of a plenary suit between the trustee and the other claimants.[7] Although it is not clear from the opinion whether Justice Cardozo was referring to appointment of a receiver by the bankruptcy court, or by the court hearing the

[6] *In re Empire Finance Corp.*, 1 F. Supp. 298 (N. D. Cal. 1932).

[7] 301 U. S. 278, at 287.

plenary suit, his reference is undoubtedly equally applicable to both.[8]

In the *Mitchell* case, the Court of Appeals had before it the question of the validity of an order requiring a third party to deposit a contested fund into court or to give equivalent security. This order had been obtained by a receiver of the estate appointed prior to the qualification of a trustee. In affirming the order, the Court pointed out that had the receiver possessed the same standing as a trustee to litigate claims, that an equitable remedy to preserve the property held by the third party, including that of a receivership, would have been proper.[9] The fact that the receiver was believed by the district court not to possess such standing did not detract from the power to preserve the property until a trustee could be appointed and suit prosecuted to its termination. These decisions leave no doubt that this Court possesses power to appoint a Receiver for 1050 Park Avenue.

Totally apart from the Court's power in this matter, I have serious reservations concerning Peter Jakobson's standing to object to this application. His contract is still in force. There is no need, therefore, to consider his objections to the appointment of the Receiver since for the time being, at least, the Receiver will step into the shoes of Herbert Birrell and one of his first obligations will be to appraise the business value of the Jakobson contract and take such action with respect to it as he may be advised.

An order appointing the Receiver is filed herewith.

Dated: New York, N. Y., November 7, 1962

.....

EDMUND L. PALMIERI
U. S. D. J.

---

[8] See also *Halpert* v. *Engine Air Service, Inc.*, 212 F. 2d 860, 862-63 (2d Cir. 1954).

[9] 278 Fed. 707, at 710.

Opinion of United States Court of Appeals for the Second Circuit

PER CURIAM:

This is one of a series of proceedings in the complicated affairs of the debtors in the Chapter X bankruptcy of the debtors described in the title of this case. Under the circumstances we think a reversal of this order might render nugatory and futile further action by Judge Palmieri. See *Ferguson* v. *Tabah*, 2 Cir., 1961, 288 F. 2d 665, affirming *sub. nom. Ferguson* v. *Birrell*, S. D. N. Y., 1960, 190 F. Supp. 506; *McDonnell* v. *Tabah*, 2 Cir., 1961, 297 F. 2d 731, affirming, S. D. N. Y., 1961, 196 F. Sup. 496; *Pettit* v. *Doeskin Products, Inc.*, 2 Cir., 1959, 270 F. 2d 95, rehearing denied, 270 F. 2d 699, cert. denied, 362 U. S. 910; *Saltzman* v. *Birrell*, S. D. N. Y., 1957, 156 F. Supp. 538.

The appeal is from the order of November 30, 1962, appointing a receiver of the premises at 1050 Park Avenue, New York City. We affirm. See opinion below filed November 7, 1962 (not reported).

Affirmed.

Opinion of United States Court of Appeals for the Second Circuit on Petition for Rehearing

PER CURIAM.

Petition denied.

HRM
SRW
LPM
U. S. C. JJ.

February 13, 1963

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IN THE

Supreme Court of the United States

October Term, 1962

No. 124

In the Matter

of

SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN-FINCH PETRO CHEMICAL CORPORATION,

Debtors.

PETER JAKOBSON,

Petitioner,

against

GEORGE C. LEVIN and JAMES V. HALLISEY, Trustees of SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY and SWAN FINCH PETRO CHEMICAL CORPORATION,

Respondents.

BRIEF AND APPENDIX FOR RESPONDENTS

GEORGE C. LEVIN,
Counsel for Respondents,
745 Fifth Avenue,
New York 22, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1962

No. 1092

In the Matter

of

SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN FINCH PETRO CHEMICAL CORPORATION,

Debtors.

PETER JAKOBSON,

Petitioner,

against

GEORGE C. LEVIN and JAMES V. HALLISEY, Trustees of SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY and SWAN FINCH PETRO CHEMICAL CORPORATION,

Respondents.

BRIEF FOR RESPONDENTS

Statement

This is the third time the Birrell affair has come before this Court.* No reason yet appears for further consideration of this matter by this tribunal. Review of this application should be denied because it presents no federal question, no substantial injustice and no novel or important

* In the *Matter of the Petition of Lowell M. Birrell* for a writ of prohibition and mandamus 355 U. S. 951, 2 L. Ed. 2d 528, 78 S. Ct. 546 (1958); *Doeskin Products, Inc. v. William D. Pettit, et al.*, certiorari denied, 362 U. S. 910, 80 S. Ct. 660, 4 L. Ed. 618; *Lowell M. Birrell Disbarment Proceedings*, 368 U. S. 917, 7 L. Ed. 2d 133, 82 S. Ct. 245 (1961).

ruling of law. The attempted claim of conflict among the circuits is a spurious issue urged here for the first time and, if valid, has been effectively waived below. This case continues to present an affront and a challenge to the administration of justice. Herbert A. Birrell, the brother, like the infamous Lowell, has withdrawn to Canada, while Lowell continues to enjoy the hospitality of Rio de Janeiro where neither Brazil nor our own government seems capable of dislodging him.

The Record

Petitioner's application is presented on an incomplete record and omits papers considered by the Court of Appeals. These omitted documents are partially presented here by respondents in the appendix. (p. 1a). The Court's attention is particularly directed to the motion to dismiss the appeal in the Circuit Court (Appendix, pp. 1a-19a) to which the petition makes no references whatsoever.

The Essential Facts

The facts here involved are fully discussed in three excellently written opinions by District Judge Edmund L. Palmieri. One is reproduced in petitioner's appendix, pp. 16-21 (212 F. Supp. 638), and one subsequent opinion appearing in respondents' appendix (pp. 21a-30a).

For a full statement of the facts which will not be here repeated there is included in the appendix (pp. 21a-30a) Judge Palmieri's summary of what has thus far transpired.

This Court Should Not Interfere With the Actions of the Court Below

Almost every judge of the second circuit has dealt with the Birrell affairs. In *Ferguson* v. *Tabah* (2 Cir. 1961), 288 F. 2d 665, Circuit Judge Smith discussing "The misguided financial genius of Mr. Birrell" has summarized

"the scope of the judicial business created by Birrell" with a prophetic comment: "This sampling of cases by no means exhausts all of the Birrell inspired litigation and the complete unraveling of his affairs will undoubtedly spawn even more cases in the future" citing cases.[1]

In that case the Court of Appeals affirmed Judge Palmieri's putting Doeskin Products, Inc. in charge of Court-appointed fiscal agents, a virtual receivership.

In *Ferguson* v. *Bucks County Farms Inc.*, 280 F. 2d 739 the third circuit (1961) approved the appointment of a receivership of Birrell's property.

For the glaring facts here present the Court is referred to District Judge Palmieri's opinion, particularly the latest one summarizing the facts (Appendix, pp. 21a-30a).

Motion to Dismiss Appeal

Petitioner studiously avoids reference to this motion which has not been brought to the attention of the Court. The respondents are therefore compelled to include the papers in the annexed appendix (pp. 1a-19a).

---

[1] "The misguided financial genius of Mr. Birrell has received nationwide periodical treatment in the November, 1959 issue of Fortune and in a July, 1959 issue of Life.

A representation of the scope of the judicial business created by Birrell can be found in Birnbaum v. Birrell, D. C. S. D. N. Y. 1955, 17 F. R. D. 409; Saltzman v. Birrell, D. C. S. D. N. Y. 1957, 156 F. Supp. 538; Claude Neon, Inc. v. Birrell, D. C. S. D. N. Y. 1959, 177 F. Supp. 706; Pettit v. Doeskin Products, Inc., 2 Cir., 1959, 270 F. 2d 95, rehearing denied 2 Cir., 270 F. 2d 699, certiorari denied 362 U. S. 910, 80 S. Ct. 660, 4 L. Ed. 2d 618; Grubbs v. Pettit, 2 Cir. 1960, 282 F. 2d 557; Ings v. Ferguson, 2 Cir., 1960, 282 F. 2d 149; Ferguson v. Bartels Brewing Co., 2 Cir., 1961, 284 F. 2d 855; Weinberger v. Bradley, Sup., 210 N. Y. S. 2d 658. This sampling of cases by no means exhausts all of the Birrell inspired litigation and the complete unraveling of his affairs will undoubtedly spawn even more cases in the future."

The Trustees contended below that petitioner Jakobson was a stooge acting for Herbert Birrell who had fled to Canada; that Jakobson was Herbert's agent discharged by the receiver and that he had no standing to appeal or to attack the receivership order (pp. 3a, 9a, 10a).

Petitioner Is Not a Real Party in Interest

The building in question stands in the name of Birrell's brother Herbert.

Lowell has fled to Rio.

Herbert gave up his apartment and fled to Canada leaving petitioner Jakobson in charge of the building as agent under a five year lease with a clause under which he can be discharged on 60 days' notice (p. 7a).

The receiver discharged him effective January 31st, 1963 (p. 6a).

Herbert remains in Canada with $500,000 and does not appeal (p. 9a).

His stooge and dummy does.

Petitioner paid no money for a lease to a 14-story apartment building at 1050 Park Avenue (87th Street), New York City (p. 5a).

Subsequent to the appointment of a receiver and on February 14, 1963 Herbert Birrell from his Canadian refuge *transferred* the building to Empire Associates, Inc., giving as its address his counsel's office (Appendix, pp. 31a-33a).

Climaxing this effrontery *petitioner* proceeded to Canada and contracted to buy the building in the name of

Peter Jakobson Corporation

on February 22, 1963 (pp. 34a, 23a).

How brazen can you get and call yourself a "bona fide obligee" (p. 8)?

The Theory of the Action Against Herbert Birrell

Petitioner argues (p. 14): "The plenary action was commenced in 1962—11 years after the alleged transfer."

The Trustees contend Lowell Birrell has been a known thief since 1947. See allegations of complaint.[1] Anticipating judgments he kept no property in his own name. A long-drawn-out stockholder suit culminated in a personal judgment against Lowell Birrell for $3,256,639.40 entered on February 27, 1958. See *Claude Neon, Inc.* v. *Birrell*, 177 F. Supp. 706, 707 (D. C. S. D. N. Y. 1959).

In 1947 stockholders were clamoring for a receivership of Doeskin Products, Inc. (then Sanapak. See 85 N. Y. Supp. (2d) 462, 1947).

---

[1] The complaint alleges:

"15. That prior, during and subsequent to the aforesaid period of time, that is from 1944 to 1957, Lowell embarked upon a career of obtaining control of various corporations and stealing their assets and that from 1944 until the present, Lowell was substantially indebted to various parties and intended to engage in speculative and hazardous enterprises in connection with which he intended to incur further indebtedness as part of his illegal ventures.

16. That in the course of Lowell's infamous career, he has used his brother Herbert many times as a nominee and dummy to hold securities in Herbert's name in order that Lowell's creditors could not attack them.

17. That on or about February 16, 1951 Lowell, intending to secrete his assets, transferred the said apartment house by deed from Ruby to Herbert; that at the time of the said transfer Lowell was a defendant in an important stockholders' suit involving Doeskin Products, Inc. (see *Waterman, et al.* v. *Johnston, et al.*, 85 N. Y. Supp. (2d) 462).

18. The transfer to Herbert of the Park Avenue property was without a present fair consideration and made solely with the intent to delay, hinder and defraud existing and subsequent creditors of Lowell and many of the corporations which he dominated and controlled, including Swan-Finch as a subsequent creditor."

POINT ONE

This application involves an exercise of discretion in appointing a receiver by the District Court approved by the Court of Appeals and with which this Court should not interfere.

Circuit courts have three times approved the appointment of receivers or fiscal agents of property claimed to be controlled by Lowell Birrell.

Ferguson v. *Bucks County Farms, Inc.*, 280 F. 2d 739 (3rd Cir. 1960);
Ferguson v. *Tabah*, 288 F. 2d 665 (2nd Cir. 1961);
Jakobson v. *Trustees of Swan-Finch Oil Corporation*, 313 F. 2d 140 (2nd Cir. 1963).

Since the appointment of a receiver involves an exercise of discretion, the handling of this bizarre case should be left to the judgment of the courts below which are by now abundantly familiar with the Birrell maneuvers.

POINT TWO

Having consented in open Court to a prompt hearing to avoid the effect of a motion to dismiss the appeal, petitioner cannot now be heard to criticize the Court for a summary disposition.

The Proceedings in the Court of Appeals and the Minutes of That Court

The petitioner, to thwart the receivership order and to prevent his ouster as managing agent, made a motion for a stay of the order appointing the receiver. These motion papers are part of the documents certified to this court. The motion was returnable January 14, 1963. The respondents made a cross-motion, returnable the same day, to

dismiss the appeal. These papers were *not* certified to this court and respondents have therefore included them in the appendix (at pp. 1a-19a). On the return day of these two motions before Circuit Judges Moore, Waterman and Medina, Presiding Judge Medina stated that the court was loath to dismiss any litigant's appeal, however meritorious the objection, and would prefer to hear the matter on the merits.

Counsel were asked by the Presiding Judge if they would be agreeable to return in the afternoon of the motion day and argue the matter fully on the merits. Both counsel consented. On the afternoon of that day the appeal was fully argued, the opening presentation being made at some length by the petitioner in this court (see Excerpts from Court of Appeals Minute Book (Appendix, p. 20a)).

Decision was reserved and counsel were thanked for their cooperation in assisting the court to dispose of the matter expeditiously. Two days later an affirming opinion was filed (see p. 22 of the petition). (The opinion is reported at 213 F. 2d 140.)

After consenting to this disposition in the petition for rehearing, it is also suggested (p. 3) "instead, a precipitous and summary method of judicial determination was utilized." If this be so, it was with the petitioner's consent, who cannot now be heard to complain.

Petitioner complains repeatedly that the Court of Appeals in dealing with this matter "directed argument of the appeal in this case without record, briefs or appendix" (p. 2). It is maintained there was a "summary disposition by a court of appeals * * *" (p. 4). It is stated (p. 7) "on the return of the motion, the court directed that the appeal itself be heard forthwith on the same day. The appeal was argued but no written briefs or other printed matter were ever submitted." One would think that the petitioner was a victim of horseback justice at Foley Square. At page 11

emphasis is again placed on "the summary nature of the proceedings * * * involving the argument of the appeal without briefs and on oral argument alone, * * *".

At page 12 under a separate point heading, "The court of appeals failed to afford proper review of the determination in the District Court."

Petitioner again complains of "The summary nature of the treatment of the appeal * * *". At page 13 it is stated, "The Court of Appeals, in its summary disposition, offered no guidance in this respect. In the interest of the administration of the bankruptcy laws in the federal courts and in the general interest of the adequate appellate supervision of district courts, certiorari should be granted."

In the light of the explanation of what actually transpired in the Court of Appeals, respondent submits the foregoing is an imposition on the Court.

POINT THREE

The demand for a bond is an afterthought raised in this Court for the first time and it should not be here considered. The claimed conflict among the circuits is therefore immaterial and will not be here discussed.

The request for a bond is not mentioned in any of the papers certified to this Court.

It is fundamental that a point not raised below will not be here considered.

Tyrrell v. *District of California*, 243 U. S. 1;
Duignan v. *U. S.*, 274 U. S. 195, 200;
Husty v. *U. S.*, 282 U. S. 694, 701;
California v. *Taylor*, 353 U. S. 553, 557, n. 2;
Lawn v. *U. S.*, 355 U. S. 339, 362, n. 16.

The point is not raised in the district court in the opposing affidavits; in the motion for a stay in the appellate court or in the petition for rehearing. It is therefore waived, assuming it has merit.

CONCLUSION

The petitioner has shown no reason in law or in fact which would justify this Court in granting his petition for certiorari and therefore the petition should be dismissed.

Respectfully submitted,

GEORGE C. LEVIN,
Counsel for Respondents,
745 Fifth Avenue,
New York 22, N. Y.

APPENDIX

Notice of Cross Motion to Dismiss Appeal and Supporting Papers

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 27885

In the Matter of SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN FINCH PETRO CHEMICAL CORPORATION, Debtors, by GEORGE C. LEVIN and JAMES V. HALLISEY, Trustees,

Petitioners-Appellees,

and

PETER JAKOBSON,

Respondent-Appellant.

PLEASE TAKE NOTICE that upon the annexed affidavit of James V. Hallisey, Esq., verified January 10, 1963, and the annexed affidavit of John F. Kelly, Esq., verified January 7, 1963, and upon all the papers and proceedings had heretofore, including order to show cause, dated October 22, 1962, together with supporting documents; opinion by Honorable Edmund L. Palmieri, District Judge, dated November 7, 1962; order entered November 30, 1962; order and memorandum, dated December 12, 1962, extending time to file the record on appeal; and order by Honorable Edward Weinfeld, District Judge, dated December 12, 1962, the undersigned will move this Court on the 14th day of January, 1963, at Room 1705, Federal Court House, Foley Square, New York City, at 10:30 A. M., or as soon thereafter as counsel may be heard, for an order dismissing the appeal herein on the ground that the appellant has no real

interest in the subject matter; he is not a party to the suit out of which the appeal arises; the cause has become moot as to the appellant; and it is wholly frivolous and taken for the purpose of delay, and for such other and further relief as the Court may deem just and proper.

Dated: New York, N. Y.
January 10, 1963.

GEORGE C. LEVIN and JAMES V. HALLISEY, Trustees,
Petitioners-Appellees,
745 Fifth Avenue,
New York 22, N. Y.

To:

ARTHUR D. EMIL, Esq.,
Attorney for Respondent-Appellant,
32 East 57th Street,
New York 22, N. Y.

JOHN F. KELLY, Esq.,
Receiver,
1780 Broadway,
New York 19, N. Y.

Affidavit of James V. Hallisey

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

JAMES V. HALLISEY, being duly sworn, deposes and says that he is one of the Trustees for the above named debtor estates, the appellees in the above entitled action, and is fully familiar with all the facts and circumstances herein after set forth.

That deponent submits this affidavit:

(a) in opposition to the motion of the appellant for a stay pending his appeal, and

(b) in support of a motion for an order dismissing the appeal by the appellant Peter Jakobson.

APPELLANT'S STATUS

That this appellant has no standing to appeal. He is a mere agent and a subordinate of Herbert A. Birrell. His rights as agent are defined by a contract. Pursuant to its terms he has been discharged. He has no standing or status to appeal in this Court.

SUMMARY OF THE FACTS

The appellees claim the apartment building in question, which is located at 1050 Park Avenue, County of New York,

is owned by Lowell M. Birrell, and title is being held in the name of his brother Herbert A. Birrell with the intent to delay; hinder and defraud creditors of Lowell M. Birrell. The appellees are creditors of Lowell M. Birrell.

That since July 1962, the appellees have been attempting to serve a subpoena upon Herbert A. Birrell, who is a citizen of the United States and who resided at 1050 Park Avenue until some time in 1962.

That it was not until a hearing for the appointment of a receiver held on November 1, 1962, before Honorable Edmund L. Palmieri, District Judge, that the appellees learned from Herbert A. Birrell's attorneys, who appeared for him specially, that Herbert A. Birrell is now a permanent resident of Canada and has given up his residence in the United States. The appellees today do not know the exact whereabouts of Herbert, since his attorneys have only revealed the city and province in Canada in which he is purported to reside.

That Herbert A. Birrell is aware of the court proceedings that have been taking place with regard to the property he allegedly owns but refuses to put in an appearance to defend his position.

That at the hearing on November 1, 1962, mentioned above, Judge Palmieri suggested to Herbert A. Birrell's attorneys that the appellees meet *in Canada* with Herbert A. Birrell to discuss this matter. This was an attempt on the part of the District Judge to give the alleged owner of the property every effort to present his case, even at the expense of the appellees. This, too, Herbert A. Birrell refused to do.

That at the time of the hearing mentioned above Herbert A. Birrell had failed to pay the real estate taxes and the insurance premiums due on the building.

That Herbert A. Birrell is a lawyer licensed to practice in the State of New York, and Lowell M. Birrell was a

lawyer licensed to practice in New York State but was recently disbarred. Lowell is presently a fugitive from justice purportedly residing in Rio de Janeiro, Brazil. He was indicted in the then called New York State Court of General Sessions, New York County, charged with 69 counts of grand larceny in the first degree for fraudulently manipulating and embezzling securities and property of the appellees.

That in February 1962, for no apparent legitimate reason, Herbert A. Birrell obtained from Greenwich Savings Bank a mortgage on 1050 Park Avenue for $1,100,000. After paying approximately $450,000 to satisfy an already existing mortgage and paying certain expenses, he immediately secreted the balance by devious ways and means and no doubt has the money with him somewhere in Canada.

That the appellees presented all these facts to the District Court on the hearing for the appointment of the receiver. (See order to show cause dated October 22, 1962.) Herbert A. Birrell did not, and has not, contested any of the facts which were presented in the District Court and which facts stand admitted on this record.

That the appellant Peter Jakobson resides at 1050 Park Avenue. In March 1962 Herbert A. Birrell approached the appellant in an elevator of that building and asked Jakobson if he would like to become managing agent for the building. On March 31, 1962, Birrell leased the entire building *for five years* to Peter Jakobson. *The appellant gave absolutely no consideration for this lease.* The lease provides, among other things, that Jakobson is to pay certain expenses of maintaining the building, and after his charges the remaining income is to be remitted to Herbert's attorney, Paul Lindemann, at 342 Madison Avenue, New York, N. Y. This lease appears to have been executed for the sole purpose of taking the income from the building and routing it to Herbert A. Birrell in a complicated man-

ner. For the work that Peter Jakobson is to do under the lease, the arrangement was extremely profitable to him in that he was to receive $17,000 plus one-half of any rent increases for each tenant for the first year. Under the terms of the lease Herbert A. Birrell could cancel the lease *at any time* by giving 60 days' notice, plus making a payment of $5,000 to Jakobson.

That the receiver has given the appellant the 60-day notice provided for in the lease. The appellant would therefore be discharged as of February 1, 1963.

That the appellant is nothing but an agent of Herbert A. Birrell. The appellant's attorney admitted before Judge Palmieri that Jakobson was duped by Herbert A. Birrell and that the receiver could cancel the lease by complying with its terms.

That Herbert A. Birrell's attorneys, who appeared for him specially in the proceedings below, filed a notice of appeal on November 14, 1962, from the order appointing the receiver which was dated November 7, 1962. From the date the notice of appeal was filed to the date of this motion, 64 days have elapsed. Under Rule 14(a) of the Rules of the United States Court of Appeals for the Second Circuit, an appellant must docket the action and file the record in this Court within 40 days after filing the notice of appeal with the District Court.

That Herbert A. Birrell is attempting to use his agent to delay the administration of justice. He will not put in a personal appearance and is attempting to do indirectly what he dare not do directly.

That when Judge Palmieri, on December 18, 1962, granted the appellant an extension of time to file the record on appeal, he wrote a memorandum which reads:

> "The application has been granted to the extent of extending the time to file the record on appeal to January 10, 1963. However, this action has been

taken solely to allow the court sufficient time to scrutinize the order expected to be signed in the near future by Judge Weinfeld granting the Trustees' application made this date on consent of the defendant Peter Jakobson to discontinue the action as to him. Such order will probably render the instant application moot and remove the basis for any appeal by Jakobson. The Trustees may submit any answering affidavits if they are so advised."

Judge Weinfeld signed the order on December 27, 1962, on consent of the appellant.

COURT PROCEEDINGS

That in August, 1962 appellees commenced an action against Lowell M. Birrell, Herbert A. Birrell, Ruby Trading Corporation, Harry Casper and Peter Jakobson to set aside conveyances which appellees alleged were fraudulent.

That appellant Peter Jakobson was a party to that action as the lessee and agent of Herbert A. Birrell. Herbert could not be served personally because he fled to Canada where he took up permanent residence. Lowell M. Birrell could not be served personally because he is a fugitive from justice residing in Rio de Janeiro, Brazil. Lowell and Herbert Birrell were officers of Ruby Trading Corporation, and the present whereabouts of Ruby Trading cannot be determined.

That on October 22, 1962, appellees made application before Judge Palmieri, under whose supervision the reorganization proceedings of the debtor estates are being conducted, for the appointment of a receiver for the building located at 1050 Park Avenue. The appellant and Herbert A. Birrell's attorneys were served with copies of the application.

Affidavit of James Hallisey

That a hearing was held on November 1, 1962, at which Peter Jakobson appeared and Herbert A. Birrell's attorneys appeared for him specially.

That an order was signed by Judge Palmieri on November 7, 1962, appointing John F. Kelly, Esq., temporary receiver of the building.

That appellant objected to certain provisions contained in the order of November 7, 1962.

That on November 27, 1962, an application was made by the appellees to Judge Palmieri to modify the order of November 7, 1962, appointing the temporary receiver. Appellant Peter Jakobson appeared at the hearing and submitted papers. The application was granted. *Appellant's attorney prepared the order which was signed on November 30, 1962*, effective nunc pro tunc as of November 7, 1962. The appellant is attempting to appeal from an order which his own attorney prepared and which order was entered at his instance.

That the appellant has not made a motion to set aside the order appointing the receiver and has not made an application for a stay in the District Court. His motion for a stay and his appeal to this Court is solely to enable him to retain this highly lucrative lease arrangement.

That the appellant is attempting to prevent the court appointed receiver from performing his duties in accordance with the order signed by Judge Palmieri.

That on December 27, 1962, Judge Weinfeld signed an order on consent of appellant discontinuing Peter Jakobson as a defendant in the action bearing docket No. 62 Civ. 2890 which was commenced by the appellees against the Birrell brothers.

RELIEF

Appellees ask that the motion for a stay be denied because:

Affidavit of James Hallisey

1. It is a spurious attempt to delay the court-appointed receiver from performing his duties.

2. It is an attempt on the part of Herbert A. Birrell to use his agent to do his bidding, something which he dare not do himself while he continues to remain in Canada, immune to process, and with $500,000.00 in his possession.

3. The property in question is located at 1050 Park Avenue, County of New York, which is within the jurisdiction of the Federal District Court below. It is a well settled principle of law that a Federal Judge has discretion to appoint a temporary receiver if he believes one is needed, and this appointment can be upset by the Court of Appeals if the Federal District Judge has abused his right of discretion. In this case the alleged owner of the property has fled to Canada and will not return to defend himself: He is aware of the court proceedings taking place and would not meet with the appellees in Canada even at the suggestion of the District Judge. Therefore, on these facts, which were more fully presented to the Court below and which need not be here repeated, the appellant cannot possibly be successful on his appeal.

4. A receiver has the right to adopt or deny executory contracts which he finds in existence at the time of his appointment. The receiver in the instant case wishes to cancel the existing contract between Herbert A. Birrell and the appellant Peter Jakobson *by complying with the terms of the lease.*

Appellees ask that the appeal be dismissed because:

1. The appellant is but an agent of the purported owner of the property, and if the Court denies the stay he will not even be his agent after February 1, 1963.

Affidavit of James Hallisey

2. The appellant is no longer a party to the action below. The appellant consented to the discontiuance of the action as to himself upon the application of the appellees.

3. The appeal is wholly frivolous and taken for the purpose of delay, since appellant is appealing from an order which his counsel prepared.

4. If the appellant is allowed to go ahead with his appeal, there are only two questions which the Court of Appeals will have to pass on:

(a) jurisdiction of the subject matter and

(b) did the Federal District Judge abuse his discretion in appointing a receiver.

The answer to the first question is that the subject matter is a building located at 1050 Park Avenue, County of New York, and is within the jurisdiction of the Federal District Court below. With respect to the second question, the District Judge could not possibly have abused his discretion if the purported owner of the building fled to Canada, took up permanent residence there and has not put in a personal appearance to refute the allegations of the appellees. If the appellant is allowed to appeal, he will be put in the strange position of defending that about which he knows nothing. In attempting to demonstrate that the District Court abused its discretion in appointing the receiver, the appellant would have to refute the facts of the appellees. This the appellant cannot possibly do because he knows nothing of the matters involved. He is just an agent of Herbert A. Birrell as of March 31, 1962, and knows nothing of the intricate maneuvers of the Birrell brothers.

WHEREFORE, deponent respectfully requests that an order be made herein dismissing the appeal by the appellant

Peter Jakobson and that the stay which the appellant seeks be denied, and such other and further relief as to the Court may seem just and proper.

JAMES V. HALLISEY.

(Sworn to January 10, 1963.)

Affidavit of John F. Kelly

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JOHN F. KELLY, being duly sworn, deposes and says:

I am the Temporary Receiver herein and I make this affidavit in opposition to the motion by Peter Jakobson, appellant herein, for an order staying deponent as Temporary Receiver from taking any action pursuant to the order of his appointment and in support of the cross-motion by the Trustees herein, dismissing the appeal herein filed by the appellant.

STATUS OF THE PARTIES

1. Deponent was appointed Temporary Receiver of the income and real estate of 1050 Park Avenue, by order entered herein in the District Court for the Southern Dis-

trict of New York on November 7th, 1962. Thereafter, on November 30th, 1962, a further order was made and entered herein in the said Court, which by its terms was effective nunc pro tunc as of November 7th, 1962. Both of these orders provided for the appointment of deponent as Temporary Receiver of the income and real estate of 1050 Park Avenue, and required deponent, as Receiver:

> "* * * to take possession of all of the said property, assets and effects, of whatsoever nature and wheresoever located, now owned by the said Herbert A. Birrell in connection with the premises known as 1050 Park Avenue New York City now owned by him or in his possession or in the possession of Peter Jakobson, or any agent, officer or representative of said Herbert A. Birrell or Peter Jakobson, together with any and all real estate and property pertaining thereto located at 1050 Park Avenue, New York City * * *."

2. Herbert A. Birrell appeared specially and filed a notice of Appeal on November 13, 1962, from the appointment of deponent as Temporary Receiver. However, he has failed to appear generally and has failed to docket and record the papers on appeal within the specified time.

3. Peter Jakobson is named the lessee in an alleged indenture of lease dated March 31st, 1962, covering the premises 1050 Park Avenue, in which lease Herbert A. Birrell is the named lessor. The said Peter Jakobson was originally named as a party defendant in an action commenced by the Trustees herein against Ruby Trading Corporation, Lowell A. Birrell, Herbert A. Birrell, Harry Casper and Peter Jakobson, 62 Civ. 2890. By order made and entered on December 27th, 1962, on the application by the Trustee and the consent of the attorney for the said

Peter Jakobson, an order was made and entered herein discontinuing the action as to the defendant, Peter Jakobson, without costs (Weinfeld J.).

BACKGROUND FOR AND PREPARATION OF AMENDED ORDER OF NOVEMBER 30TH, 1962

4. The moving affidavit of the attorney for the appellant (page 5) conveys the impression that the appellant was a stranger to the amended order and was further aggrieved by it. Nothing could be further from the truth.

5. Immediately after the appointment of deponent as Temporary Receiver for Herbert A. Birrell, deponent visited and examined the premises and conferred with the Trustees and with the appellant, Peter Jakobson, and his attorney, Arthur D. Emil, Esq., in order to become familiar with the subject matter and property for which deponent had been designated Temporary Receiver.

6. In these and subsequent conversations, Mr. Emil stated that he did not and could not have any valid objection to the appointment of deponent as Temporary Receiver, for Herbert A. Birrell, and he further conceded that deponent, as such Receiver, had all of the rights and obligations of Herbert A. Birrell under the aforementioned indenture of lease dated March 31st, 1962.

7. Mr. Emil, however, did object to certain language contained in the said order of November 7th, 1962, insofar as the same referred to his client, Peter Jakobson, and might conceivably adversely affect the rights of his said client, the appellant herein. Mr. Emil indicated that for this reason he filed the notice of appeal and notice of motion in this Court seeking an order staying the Temporary Re-

ceiver (his affidavit, page 4). Inasmuch as that part of the language of the order of November 7th, 1962 which Mr. Emil deemed objectionable was of no consequence to the function of deponent as Temporary Receiver, deponent and the Trustees herein, without conceding that such language was objectionable, nevertheless agreed to the entry of an amended order which would satisfy the objections raised by Mr. Emil as the attorney for the appellant, Peter Jakobson.

8. *Mr. Emil, the attorney for the appellant, Peter Jakobson, himself drew the new order which was made and entered herein November 30th, 1962 nunc pro tunc as of November 7th 1962.* He would now appeal from his own order and ask this Court to stay the actions of the Receiver in the performance of his designated duties, pending such appeal.

PROVISIONS OF LEASE BETWEEN HERBERT A. BIRRELL AS LESSOR AND PETER JAKOBSON, AS LESSEE

9. As in many parts of the moving papers, there are significant omissions of fact. The moving papers would create the impression that the Temporary Receiver had charged on to the scene and without any justification or authority had served notice of cancellation of the five year lease commencing on May 1st, 1962 and ending on April 30th, 1967, in which Mr. Jakobson is the lessee. Such impression is not correct.

10. The Temporary Receiver has at all times fully respected the lease. Deponent assumes, ad arguendo, that the appellant is a valid lessee, even though many aspects of the case have created a different impression as to the true role of Peter Jakobson.

11. The lease itself provides that either of the parties shall hav the right to cancel the lease by giving to the other party sixty days' notice in writing of his intentions so to do. The said provision of the lease is attached hereto, made part hereof and marked Exhibit "A".

ALLEGED UNLAWFUL ACT OF RECEIVER

12. After a careful examination of the property and the records thereof by the Temporary Receiver and his accountant, deponent, as Temporary Receiver, determined that the aforementioned indenture of lease dated March 31st, 1962 between Herbert A. Birrell, as lessor and Peter Jakobson, as lessee, was an undue burden on the said property and that in the interests of the preservation of the property for which deponent had been appointed the Temporary Receiver, the said indenture of lease should be terminated pursuant to the terms of the said lease since there could thus be accomplished an estimated annual savings of upwards of $20,000 to the estate for which deponent was appointed Temporary Receiver.

13. The amended order which had been prepared by Mr. Emil, the attorney for the appellant, Peter Jakobson, was made and entered herein on November 30th, 1962, nunc pro tunc as of November 7th, 1962. Immediately thereafter, and in strict compliance with the terms and provisions of the said indenture of lease, deponent, as Temporary Receiver, served upon Mr. Jakobson the required sixty day notice electing to terminate the said lease effective January 31st, 1963. A true copy of the said notice of termination is attached hereto, made part hereof and marked Exhibit "B".

14. It is well established that a Receiver may, under certain circumstances, refuse to adopt an existing contract

which he deems an undue burden on the estate. Deponent, as Temporary Receiver, has not availed himself of such privilege but has fully complied with all of the terms and provisions of the said indenture of lease, to the extent that the same are the obligations of the lessor. Deponent has done what Herbert A. Birrell was entitled to do under the terms and provisions of the said lease made with the appellant. If Mr. Jakobson is a victim, he is a victim only of his own agreement of March 31st, 1962. It is respectfully submitted that having determined that the aforementioned indenture of lease is an undue burden on the property for which he was appointed Temporary Receiver, deponent would have been remiss in his obligations as Temporary Receiver to act otherwise than he has done in this instance.

THE TERMINATION OF THE LEASE WILL NOT ADVERSELY AFFECT THE PREMISES

15. An examination of the premises and conversations with some tenants indicate that the premises have been operated in a rather ordinary fashion. Certainly, there is nothing unique about the present management of the premises.

16. Deponent, as Temporary Receiver, has surveyed the premises and interviewed the various employees at the premises in order to insure that there will be a continued operation and no termination of tenant services.

17. Insofar as the alleged negotiations for rent increases are concerned, again deponent respectfully submits that there is nothing unique about such services and deponent is fully prepared to exert every possible effort to the end that the maximum rent may be achieved from the premises.

18. The desperate effort by the appellant to remain in possession of the premises and his claim of substantial loss by reason of the termination of the lease, would seem to support the decision of the Receiver to terminate the lease, pursuant to the terms and provisions thereof, as an unnecessary burden on the estate for which deponent is Receiver.

APPELLANT'S MOTION FOR STAY SHOULD BE DENIED AND HIS APPEAL DISMISSED

19. To permit the appellant to continue with his appeal, would arrive at the unusual result of allowing Herbert A. Birrell the benefit of an appeal in an action in which he has not appeared or answered or submitted himself to the jurisdiction of the Court.

20. The appellant, having been severed from the proceedings by the order of discontinuance as to him, and to which he consented, has no basis to press the appeal. In the event he feels aggrieved by a wrongful act of the Receiver, then his remedy is in a proceeding in the District Court to be brought directly against the Receiver. However, since the Receiver has fully complied with all of the terms and provisions of the agreement of lease with the appellant, it would appear that the appellant would be hard put to establish any such claim.

21. It becomes patently clear that the purpose of the appellant in continuing with the litigation and appeal is to frustrate the appointment of the Receiver and to permit the appellant to continue in occupancy of the premises so that he can derive substantial profits from such operation.

22. Accordingly, deponent respectfully requests that the motion for a stay be denied and that the appeal of the

appellant be dismissed so that the Receiver may enter upon the performance of his duties and take possession of the premises on February 1st, 1963 and apply the profits of the operations to the estate for which he has been appointed Receiver.

JOHN F. KELLY.

(Sworn to January 7, 1963.)

Exhibit A

ARTICLE XV

1. Each of the parties hereto shall have the right to cancel this lease at the end of any month by giving to the other sixty (60) days' notice, in writing, of his intention so to do, in the manner hereinafter provided. In the event that this lease should be cancelled by the Lessor and if, the Lessee is not in default of any of his obligations under the terms and provisions of this lease on the effective date of such cancellation, the Lessor shall pay the sum of $5,000 to the Lessee upon the aforesaid accounting. Upon the delivery of such payment by the Lessor to the Lessee, the Lessor shall be released and discharged of all obligations under the terms and conditions of this lease in any manner whatsoever.

Exhibit B

KELLY AND SCHWARTZ
Counselors at Law

November 30th, 1962

Mr. Peter Jakobson
1050 Park Avenue
New York 28, New York.

Dear Mr. Jakobson:

Pursuant to the provisions of the indenture of lease dated March 31st, 1962, between Herbert A. Birrell, as lessor, and yourself as lessee, and particularly Article XV thereof, you are hereby notified that the undersigned, as temporary Receiver for Herbert A. Birrell, elects to cancel the said lease effective January 31st, 1963.

The foregoing is without prejudice to any rights of the undersigned as temporary Receiver for Herbert A. Birrell and is in no sense an admission as to the validity of the said instrument.

Very truly yours,

.....

John F. Kelly
Temporary Receiver for
Herbert A. Birrell

JK:ac

Court of Appeals—Excerpt from Minute Book

Monday January 14th, 1963

Motions before: MEDINA, WATERMAN, MOORE, C. J. J.

In re Swan-Finch—Stay

In re Swan-Finch—Dismiss

The argument of the appeal has been set for this afternoon, January 14th, 1963 at 4 P. M.

No. 260

In re Swan-Finch

ON APPEAL FROM THE U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT

ARTHUR EMIL, for Appellant,
GEORGE C. LEVIN, for Appellee.

Opinion of United States District Court, Southern District of New York

PALMIERI, *J.*:

PRELIMINARY STATEMENT

The trustees of Swan Finch move for an order restraining Lois B. Morrill from collecting or attempting to collect interest or amortization on two mortgages totaling approximately $900,000, held by her on the premises 1050 Park Avenue in New York City. Mrs. Morrill is the daughter of Herbert A. Birrell and a resident of Alexandria, Virginia.

At the commencement of the proceedings seeking to question her liens, Mrs. Morrill entered a special appearance. By consent of the parties, further proceedings were adjourned pending their attempt to arrange to their mutual satisfaction the manner in which the action should proceed. A temporary restraining order, enjoining the enforcement of the mortgages, and contained in the original order to show cause, was permitted to remain in effect, as Mrs. Morrill agreed not to press whatever objections she might have to it. Counsel stated that Mrs. Morrill would not appear in New York to be examined, but would consent to examination at her home. She also agreed to make available in New York certain documents relating to her mortgages. Thereafter, the trustees received access to several of the mortgage documents. Mrs. Morrill, however, now seeks to vacate the temporary restraining order.

The property in question has been the subject of much litigation in this court in the recent past, and, indeed, this motion can be understood only against the background of the other court proceedings which illuminate what is taking place and fix it in proper perspective. In November of 1962, this Court, upon application of the trustees, appointed a receiver for the property.[1] It was pointed out that the

[1] 213 F. Supp. 638 (S.D. N. Y. 1962).

evidence submitted by the trustees and, in particular, statements made to the trustees by Lowell Birrell's wife, Merrie, justified the strong suspicion that the property, although owned in name by Herbert Birrell, was actually controlled by his brother, Lowell, a fugitive from justice. The Court also noted that in December of 1961, in seeming response to threats of Merrie to divulge the above facts, Herbert Birrell had applied for and later received a mortgage of $1,100,000 on the property, of which approximately $600,000 had been deposited in various bank accounts here and in other jurisdictions. In most instances, the local accounts were closed out a short time after the money was deposited. This Court could ascertain no apparent business reason for mortgaging the property so heavily or for disposing of the funds in the manner indicated.

The Court of Appeals in a *per curiam* opinion of January 16, 1963,[2] affirmed the appointment of the receiver. A petition for rehearing was denied.[3]

It may be noted that Herbert Birrell, now claiming to be a bona fide resident of Canada, but until recently a resident of this District and the occupant of a penthouse in the property in question, refused to submit tot his Court's jurisdiction. He has not returned here since the commencement of the 1050 Park Avenue litigation, and has also consistently refused to submit to examination by the trustees. The appointment of the receiver has been vigorously contested in this court by Peter Jakobson, who was managing the property at the time of the appointment under a net lease from Herbert Birrell. The lease was later cancelled by the receiver pursuant to a sixty day cancellation clause con-

[2] 313 F. 2d 140 (2d Cir. 1963).

[3] The docket of the Court of Appeals indicates that the record in this case was certified by the Court of Appeals on April 4, 1963, at the request of the attorney for Peter Jakobson, to permit an appeal to the Supreme Court.

tained in it. Jakobson then sought to set aside the cancellation of his lease and the taking of possession by the receiver. This Court denied such application [4] and was affirmed by the Court of Appeals.[5]

Jakobson has also withheld from the receiver upwards of $30,000 in rents, and has refrained from paying various bills incurred by him during the period of his management of the building, apparently taking the position that he is not obligated to satisfy these debts. The refusal to pay these bills has confronted the receiver with a serious obstacle in the operation of the building. This Court, on March 8, 1963, was constrained to sign an order directing Jakobson to pay and discharge all obligations incurred by him for fuel, materials, supplies, work, labor and other services when he was in control of and managed the 1050 Park Avenue premises. An appeal has been taken by Jakobson with respect to this order and compliance with it suspended pending such appeal. The question of Jakobson's withholding of the rent collections remains to be settled.

Finally, and on March 7, 1963, Jakobson's attorney exhibited to the Court a document purporting to be an agreement of sale of the 1050 Park Avenue premises from Empire Associates, Inc. to Peter Jakobson Corporation. The agreement, executed in Ontario, Canada, on February 22, 1963, includes the signatures of both Peter Jakobson and Herbert Birrell, and recites that title had been conveyed to Empire from Herbert Birrell by deed dated January 14, 1963. Jakobson's attorney argued that the agreement gave Jakobson the status of a "contract vendee," thus enhancing his standing to litigate further with respect to the property. This Court enjoined the recording of the purported contract with the Register of the City of New York on the grounds

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[4] See Memorandum of this Court dated January 31, 1963.

[5] Affirmance by Judge Medina; January 31, 1963; no written opinion.

that the agreement was an attempt to circumvent the earlier orders of the Court by placing Jakobson in the position of litigating this matter for Herbert Birrell, while Birrell remained outside the jurisdiction and immune from inquiry as to the suspicious facts surrounding the title and operation of the property. Indeed, many of the actions taken by Jakobson appear to have been dictated by the position of Herbert Birrell, who has manifested a desire to litigate without risking the consequences of an appearance before the Court.

It is with these facts in mind that the rights of Lois Morrill must be evaluated. Mrs. Morrill is the daughter of a man who has engaged in several questionable transactions with respect to the preinises, who has refused to submit to the jurisdiction and processes of this court, and who has attempted, through the medium of a third party, to defeat its orders. There is on the record evidence of substantial financial transactions between Mrs. Morrill and her father relating to this property which makes it reasonable to assume that she is not outside the scope of his influence and his financial manipulations. For example, on February 27, 1962, the same date that Herbert Birrell received the $1,100,000 mortgage from the Greenwich Savings Bank, Mrs. Morrill executed an agreement with the bank to subordinate her mortgage liens to the new lien of the bank. In alleged consideration of her making such agreement, $40,000 of the proceeds of the $1,100,000 loan was paid to her at the direction of Herbert Birrell. This $40,000 was deposited in the First and Merchants National Bank of Richmond, Virginia, a city some miles distant from Mrs. Morrill's residence.[6] Similarly, at or about the same time,

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[6] See Petition of George C. Levin In Support of Application for Appointment of a Receiver, pp. 7-8, October 22, 1962; Proposed Findings of Fact and Conclusions of Law of Lois B. Morrill, pp. 5-6, April, 1963.

Mrs. Morrill agreed with her father to extend the time of payment of her mortgages until March, 1967, provided, however, that interest be paid to her until such date.[7]

These facts, in conjunction with the substantial doubts raised by the trustees with respect to the validity of the mortgages held by Mrs. Morrill, indicate that close scrutiny of these mortgages is in order. The status quo which is subject to immediate disruption by Mrs. Morrill must be maintained while this scrutiny proceeds to conclusion. Indeed, Mrs. Morrill apparently intends to foreclose her mortgages at the earliest possible moment, a step she can take through procuration and without appearing in this case.

There is thus ample reason for the granting of the preliminary injunction as the Findings of Fact and Conclusions of Law that follow are intended to demonstrate.

Findings of Fact

1. On November 7, 1962, John F. Kelly, Esq., was appointed temporary receiver of a fourteen-story apartment house located at 1050 Park Avenue, County of New York, City of New York.

2. The temporary receiver was appointed by the United States District Court for the Southern District of New York, Palmieri, J., upon the application of George C. Levin and James V. Hallisey, trustees of the above-named debtors in Chapter X reorganization proceedings, and pending the outcome of a plenary suit instituted by them.

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[7] See Proposed Findings of Fact and Conclusions of Law of Lois B. Morrill, p. 5, April, 1963. See also Rider "C," annexed to the Contract of Sale between Empire Associates, Inc. and Peter Jakobson Corporation, providing that as a condition of sale of the property and the purchaser's assumption of the Morrill mortgages, the seller is to obtain Mrs. Morrill's consent to a modification and extension of such mortgages.

3. Lois B. Morrill, who resides at 220 Croton Drive, Alexandria, Virginia, is the married daughter of Herbert A. Birrell and the niece of Lowell M. Birrell, who are defendants in the trustees' plenary suit. Herbert, a member of the New York Bar, now claims to be a resident of Canada. Lowell, who has been disbarred in this state, is a fugitive from justice.

4. In prior proceedings in this matter, it was established, and it has not been controverted, that Herbert Birrell obtained a new first mortgage on the property on February 27, 1962; that he has withdrawn all of his funds from his local bank accounts and those of his wife, Margaret K. Birrell, removing in an irregular fashion a minimum of $500,000, and possibly $600,000, from this jurisdiction; and that he has closed all local bank accounts and has refused to come forward and explain the whereabouts and disposition of this money. No valid business reason appears for the refinancing of this building or the siphoning of these funds to distant bank accounts.

5. All of Herbert Birrell's conduct indicates a deliberate plan and scheme to divest the property of any and all revenue, leaving inadequate funds available to meet the fixed charges of the building, which were deliberately increased by the new mortgage.

6. The receiver has conducted an investigation of the liens upon the said property and has found in the office of the City Register, County of New York, mortgages recorded against the property in the name of Lois B. Morrill in the total amount of $916,606.52.

7. One Paul Lindemann, Esq., who is the attorney for Mrs. Morrill's father, Herbert A. Birrell, informed the receiver by letter that the mortgages held by Lois B. Morrill were in the total amount of $481,129.53.

8. Lois B. Morrill states in her affidavit that she has two mortgages on the said property totaling $876,606.52.

9. The recorded mortgages demand interest in the amount of $3,853 to be paid on the first day of February, May, August and November, and interest in the amount of $2,422 to be paid on the first day of January, April, July and October.

10. Examination of the record discloses that the Troy Savings Bank of Troy, New York, had for years held a first mortgage on the premises. On February 27, 1962, the Greenwich Savings Bank issued check No. 1178 in the amount of $442,734.94 to the Troy Savings Bank in apparent discharge of the mortgage.

11. According to an assignment on record with the City Register at Liber 6035, page 93, the Troy Savings Bank assigned its mortgage to Lois B. Morrill of 220 Croton Drive, Alexandria, Virginia, in consideration for $435,476.99 paid by Herbert A. Birrell, owner of 1050 Park Avenue. It is believed that the difference in amounts between the check issued by the Greenwich Savings Bank and the assignment represents adjustments or the cost of anticipating payment. From the foregoing it would appear that no consideration whatsoever passed from Lois B. Morrill to the Troy Savings Bank for the assignment of the bank's interest in this mortgage.

12. Under ordinary practice, the bank's interest in this mortgage should have been satisfied and discharged rather than assigned. It appears, therefore, that the mortgage formerly in the name of the Troy Savings Bank has been put in the name of Lois B. Morrill, possibly creating a spurious and fraudulent lien against the property; or, at the very least, a questionable gift from Herbert Birrell which deserves further scrutiny.

13. Investigation by the receiver discloses that on August 5, 1961, Commercial Operating Corporation assigned its interest in a mortgage dated April 30, 1926 to Lois B. Morrill.

14. Commercial Operating Corporation was incorporated under the laws of the State of New York on November 5, 1942, by the law firm of Birrell & Birrell, 545 Fifth Avenue. It appears from the certificate of incorporation that the incorporators were the Birrells' legal secretaries. At the time of the assignment of the mortgage to her, Lois Morrill was president of Commercial Operating Corporation. The corporation was dissolved shortly after the assignment.

15. Irreparable harm would be occasioned through the institution by Lois B. Morrill of foreclosure or other proceedings to enforce her alleged rights in the premises. Such proceedings would further cloud the title and frustrate the investigation of the facts with respect to the ownership and operation of the property.

16. Irreparable harm would also be occasioned by the payment of interest or amortization to Lois Morrill. Peter Jakobson, the former net lessee of Herbert Birrell, has, with the apparent encouragement and assistance of the said Birrell, and under the guise of an agreement with him, withheld funds necessary to the operation of the building, has not paid valid and subsisting debts and apparently has no intention of paying such debts, and has attempted to frustrate the orders of this Court. Any and all present income is needed to enable the receiver to discharge valid obligations in connection with the property. Payment to Mrs. Morrill of such income, in these circumstances, cannot be justified as long as substantial doubt exists

with respect to the validity of her mortgages, and as long as such payment would jeopardize the rights and interests of innocent third parties and creditors.

CONCLUSIONS OF LAW

1. This Court has jurisdiction to issue the preliminary injunction sought by the trustees. Bankruptcy Act, § 2(a)(15), 11 U. S. C. § 11(a)(15); *Halpert* v. *Engine Air Service, Inc.*, 212 F. 2d 860, 863 (2d Cir. 1954); *In re Int'l Power Securities Corp.*, 170 F. 2d 399 (3d Cir. 1948). See generally, 1 Collier on Bankruptcy § 2.65, at 341 & n. 9 (14th ed. 1962).

2. The evidence before the Court raised substantial issues with respect to the involvement of Mrs. Morrill in suspicious financial manipulations surrounding the operation of 1050 Park Avenue. There is thus probable cause for the issuance of a preliminary injunction to prevent obstruction of and interference with the property pending further inquiry in a plenary suit. *Steelman* v. *All Continent Corp.*, 301 U. S. 278, 288 (1937).

3. The institution of proceedings by Mrs. Morrill to establish rights to the property will cause irreparable harm if not enjoined. See Finding of Fact No. 15.

4. The payment of income to Mrs. Morrill would impair the ability of the receiver to operate the building, and would deplete an asset in which Mrs. Morrill may eventually be adjudged to have no rights, to the detriment of innocent third parties and creditors. Such payments should not be continued pending an investigation of the validity of her liens. See Finding of Fact No. 16.

Opinion of United States District Court, Southern District of New York

5. The trustees' motion for a preliminary injunction is granted.

The trustees are directed to submit on notice an appropriate order in accordance with this opinion. The order should provide that the trustees are to commence, within a reasonable time of the filing of the order, an appropriate plenary action that will serve to present for a full trial the issues between Mrs. Morrill and the trustees. Mrs. Morrill may, within a reasonable time after the filing of such action, apply to this Court to have the preliminary injunction vacated, if the trustees have not proceeded with due diligence to secure a speedy trial for the issues in this case. *Platt & Munk Co.* v. *Republic Graphics, Inc.*, Nos. 27867, 27904, 2d Cir., March 21, 1963; *Steelman* v. *All Continent Corp.*, 301 U. S. 278, 290 (1937). The Court reserves decision on the question of whether security should be dispensed with in accordance with the authority of *Halpert* v. *Engine Air Service, Inc.*, 212 F. 2d 860 (2d Cir. 1954).

Dated: New York, N. Y.,
April 29, 1963.

EDMUND L. PALMIERI,
U. S. D. J.

Contract

THIS INDENTURE, made the 14th day of January, nineteen hundred and sixty-three.

BETWEEN HERBERT A. BIERELL, residing at c/o G. Yates, 32 James St. So. Hamilton, Ontario, Canada party of the first part and EMPIRE ASSOCIATES, INC., having its office at Suite 300, 545 Fifth Avenue, New York 17, New York party of the second part,

WITNESSETH, that the party of the first part, in consideration of Ten Dollars and other valuable consideration paid by the party of the second part, does hereby grant and release unto the party of the second part, the heirs or successors and assigns of the party of the second part forever,

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

BEGINNING at the corner formed by the intersection of the southerly side of East 87th Street and the westerly side of Park Avenue; running thence westerly along said southerly side of 87th Street one hundred thirty-three (133) feet, four and one-quarter ($4\frac{1}{4}$) inches; thence southerly, parallel with Park Avenue, one hundred (100) feet, eight and one-half ($8\frac{1}{2}$) inches to the centre line of the block; thence easterly, parallel with the southerly side of 87th Street, one hundred thirty-three (133) feet, four and one-quarter ($4\frac{1}{4}$) inches to the westerly side of Park Avenue, and thence northerly along said westerly side of Park Avenue, one hundred (100) feet, eight and one-half ($8\frac{1}{2}$) inches to the point or place of beginning.

Contract

SAID premises being known as and by the street numbers 64, 72 and 74 East 87th Street, and 1050, 1052, 1054 and 1056 Park Avenue.

Subject to mortgages of record and interest thereon.

TOGETHER with all right, title and interest, if any, of the party of the first part in and to any streets and roads abutting the above described premises to the center lines thereof; TOGETHER with the appurtenances and all the estate and rights of the party of the first part in and to said premises; TO HAVE AND TO HOLD the premises herein granted unto the party of the second part, the heirs or successors and assigns of the party of the second part forever.

AND the party of the first part covenants that the party of the first part has not done or suffered anything whereby the said premises have been encumbered in any way whatever, except as aforesaid.

AND the party of the first part, in compliance with Section 13 of the Lien Law, covenants that the party of the first part will receive the consideration for this conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose.

The word "party" shall be construed as if it read "parties" whenever the sense of this indenture so requires.

IN WITNESS WHEREOF, the party of the first part has duly executed this deed the day and year first above written.

In Presence of:

GEORGE YATES

HERBERT A. BIRRELL.

Contract

CANADA
PROVINCE OF ONTARIO } ss.:
COUNTY OF WENTWORTH

I, G. T. INCH, of the City of Hamilton, in the County of Wentworth, in the Province of Ontario, in the Dominion of Canada, Clerk of the County Court of the said County the said Court being a Court of Record having by law a seal.

Do hereby Certify as follows: GEORGE YATES, in the said Province, whose name is subscribed to the attached Instrument, was at the time of subscribing thereto, a Notary Public in and for the Province of Ontario, Canada duly commissioned and duly authorized by the laws thereof to administer oaths, to take affidavits and to certify the proof of deeds and other instruments in writ to be recorded within the said Province;

I have compared the signature of the said Notary Public subscribed to the attached Instrument with the specimen signature of the said Notary Public filed in this office and verily believe the said signature to be genuine; and

I have compared the impression of the seal on the attached Instrument with the specimen impression of the seal of the said Notary Public filed in this office and verily believe the said impression of the seal to be genuine.

IN TESTIMONY WHEREOF I have hereunto set my Hand and official seal at Hamilton, this 14th day of January, 1963.

G. T. INCH, D. B.,
(G. T. Inch), Clerk, County Court,
County of Wentworth.

[SEAL]

On the day of January 1963, before me personally came HERBERT A. BIRRELL, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged that he executed the same.

A Notary Public in and for the Province of Ontario.
My Commission expires at Her Majesty's Pleasure.

Letter, Dated March 7, 1963

ARTHUR D. EMIL
Attorney at Law

LAWRENCE A. KOBRIN
LOREN A. WITTNER

32 East 57 Street, New York 22
MUrray Hill 8-6040
Cable Address Ademillaw

March 7, 1963

George C. Levin, Esq. and
James V. Hallisey, Esq.,
Trustees
745 Fifth Avenue
New York 22, New York

John F. Kelly, Esq.,
Temporary Receiver
1780 Broadway
New York, New York

Gentlemen:

I represent Peter Jakobson Corporation. This is to advise you that said corporation has executed a contract dated February 22, 1963 with Empire Associates, Inc. for the purchase of premises 1050 Park Avenue. In accordance with the provisions of Paragraph 2 of Rider B of said contract, I enclose herewith a photostatic copy of said contract.

The Peter Jakobson Corporation will take all steps necessary to assist in the determination of the true ownership of 1050 Park Avenue so that it may enforce its contract.

Very truly yours,

A. D. EMIL

ADE:ge
Enclosure
Hand Delivery

Office-Supreme Court, U.S.
FILED
JUL 29 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted] 124

IN THE MATTER

OF

SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN-FINCH PETRO CHEMICAL CORPORATION,

Debtors.

PETER JAKOBSON,

Petitioner,

AGAINST

GEORGE C. LEVIN and JAMES V. HALLISEY, Trustees of SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY and SWAN-FINCH PETRO CHEMICAL CORPORATION,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

DAVID W. KAHN and
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Counsel for Petitioner,
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New York 5, N. Y.

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LODER APPEAL PRESS, INC., 41 VESEY STREET, NEW YORK, N. Y. WOrth-2-0689

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IN THE

Supreme Court of the United States

OCTOBER TERM 1962

No. 1092

In the Matter

of

SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN FINCH PETRO CHEMICAL CORPORATION,

Debtors.

PETER JAKOBSON,

Petitioner,

AGAINST

GEORGE C. LEVIN and JAMES V. HALLISEY, Trustees of SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY and SWAN-FINCH PETRO CHEMICAL CORPORATION,

Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Statement

Respondents, for their answer to the petition for certiorari herein, filed a brief and appendix which deals only in part with the issues presented on the present appli-

cation. Most of the allegedly additional parts of the "record" supplied relates to other proceedings affecting altogether different parties with whom Petitioner has no connection whatsoever. There is, we submit, no excuse for the inclusion of these extraneous papers in the record.

It is obvious that most of the Respondents' brief and the extraneous papers printed in the appendix which deal with Lois B. Morrill represent nothing but a calculated effort to spread such an atmosphere of prejudice over this whole case so as to obscure the few simple legal questions presented. And this effort is a very unfair one because, as we stated in our original petition for certiorari, Respondents' counsel in the hearing of the argument before Judge Palmieri in the District Court had completely exonerated Petitioner from all charges of connivance with Lowell Birrell and of any other species of wrongdoing or sharp practice. Respondents now seek to paint an entirely different picture of Petitioner and present him to the Court as a creature of the Birrells, tarred with the same paint as the Birrells and one who is entitled to no consideration whatsoever from this Court because he is nothing but a dummy for Herbert Birrell.

Nor is this all. In a further effort to poison the atmosphere of the proceeding, Respondents' counsel have printed in their appendix papers that were never before Judge Palmieri or the Court of Appeals and which, indeed, have no relation to Petitioner's claim under his lease of the property here involved. For example, there is printed in the Appendix, an affidavit of James V. Hallisey, one of the Respondents, on a motion to dismiss the Petitioner's appeal in the Court of Appeals together with notice of motion thereto attached (3a to 11a); also an affidavit of J. F. Kelly who was appointed Receiver of the property by Judge Palmieri, (11a to 18a). The affidavit of Hallisey is replete with conclusory statements and arguments

of a highly prejudicial character—though far short of probative facts. The affidavit of Kelly deals only with his conduct of the receivership and of necessity does not and cannot touch upon the origin of the lease or the conditions under which this lease was negotiated. It therefore has no probative effect.

The Appellate Court below did not grant Respondent's motion to dismiss the appeal. On the contrary, the Court proceeded to hear the appeal and it is from its determination after the hearing that this petition for certiorari is made. The inclusion of motion papers furnished in connection with a motion to dismiss an appeal is not only totally unwarranted but completely misleading—almost purposefully confusing. The proper record on appeal, under the rules in the Court of Appeals for the Second Circuit and the rules of this Court, does not include the unsupported allegations set forth in the affidavit. It was for that reason, obviously, that the certification of the Clerk of the Court of Appeals did not include these papers.

Proper balance of the record before the Court at this time, however, must require that the conclusory and unsupported material furnished in the irrelevant affidavit be supplied with some response. Thus, if papers in support of the already moot motion to dismiss the appeal made by Respondents are included in the record here, the reply affidavit submitted at the same time should also be available. For this reason, Petitioner includes, albeit reluctantly, as an appendix to this reply brief, the reply affidavit of Arthur D. Emil, attorney for Petitioner, in the Court of Appeals.

Still further: It was even more indefensible for Respondents to print in their Appendix the opinion written by Judge Palmieri on April 29, 1963 (21a to 30a) on a

completely different and subsequent motion made by Respondents against one Lois B. Morrill, having to do with the collection by her of interest on two mortgages which she owned. This motion against Lois B. Morrill was made long subsequent to the appointment of the Receiver in the instant case. Petitioner was in no way involved in this motion against Lois B. Morrill nor did he appear therein. Why, therefore, was this later opinion of Judge Palmieri, in a different matter, printed in the Respondents' appendix? The obvious answer is that this opinion excoriates the fugitive, Lowell Birrell, who is now in Brazil. It was evidently the notion of Respondents that by pouring more prejudice into the record everyone who ever had anything to do with any Birrell is, of necessity, tainted. Clearly, this later opinion in an entirely different proceeding ought to be disregarded by this Court.

When the instant matter was before Judge Palmieri on November 1, 1962, the following is what Mr. Levin, Respondents' counsel, said to the Court concerning the Petitioner:

> "Incidentally, with respect to the respondent Jakobson, who for the purpose of this discussion I will concede is an honest individual who entered into this for the laudable purpose of trying to make some money. He can't be criticized for that. We don't charge him with being privy or party to any of the machinations in which any of the Birrells are involved."

In the light of the foregoing, this Court can judge of the sincerity of Respondents' vehemence in characterizing Petitioner (p. 4 of the Answer) as "a stooge acting for Herbert Birrell * * *" and asking "How brazen" Petitioner can get in calling himself a "bona fide obligee".

And it should be further mentioned that at page 57 of the transcript of the same hearing before Judge Palmieri on November 1, 1962, the following is what Mr. Levin, Respondents' counsel, again said:

> "I know nothing to base any criticism on either Mr. Emil or his client." (Petitioner).

Before proceeding with the discussion of the legal points mentioned in Respondents' Answer and brief the Court's attention should again be directed to the fact that the parcel of real estate here in controversy was never owned by the debtor corporations; nor is any claim made that any moneys of the debtor corporations were ever used by Lowell Birrell to acquire this property. Title to the property was acquired in March 1944 by Ruby Trading Corp. of which, as the petition for certiorari reveals, Lowell Birrell owned only 25% of the stock. That factual allegation is not denied in Respondents' brief in opposition. Ruby, as far back as February 16, 1951, deeded this property to Petitioner's lessor, Herbert A. Birrell, who has had the title ever since. While we are not here concerned with the status of Herbert A. Birrell, it is to be noted that, unlike his brother Lowell Birrell, he has not been indicted or charged with any diversion or concealment of assets of the debtor corporations. Since the petition for reorganization herein was only filed in 1959, it will be apparent that the Respondents' claim that they may be able, hereafter, to establish some claim to this property as a part of the assets of the debtor corporations, is not only far fetched but so improbable as to be worthy of no serious discussion.

As was pointed out in our petition for the writ of certiorari, the sole ground on which the Respondents can hope to establish any claim in or against the real estate

is that Lowell Birrell still retains an interest in the property despite the unconditional transfer of the fee to Herbert Birrell in 1951; that Lowell Birrell is indebted to the Respondents on a claim which they have against him for diversion of assets of the debtor corporations; and that a receivership of the property is necessary to protect the Respondents' recovery—if and when they get one—so that it may be satisfied out of Lowell Birrell's interest. It has already been mentioned in our petition for certiorari that the theory of the suit brought in the District Court by Respondents is that Lowell Birrell, many years before the reorganization of the debtor corporation, conceived a plan to defraud his *future* creditors and that therefore, any transfers made by him, even as far back as 1944 can be attacked.

Patently, what Respondents were really seeking on their application in the District Court was an attachment of any possible interest that Lowell Birrell had in the property so that out of such attached property any judgment recovered by them could be satisfied. But the Respondents asked, not for an attachment of Lowell Birrell's interest—which they could have gotten under the provisions of the New York Civil Practice Act (Section 902), but instead, to a receivership of the whole property, the effect of which was to divest Petitioner, a concededly *bona fide* and legitimate lessee, of whatever bargain he made when he undertook to enter into a five-year operating lease of the property with Herbert Birrell—not with Lowell Birrell.

The fact that Lowell Birrell is a fugitive in Brazil under indictment in the United States, and that Herbert Birrell sees fit to reside in Canada can have no legitimate bearing upon the *bona fides* of Petitioner's lease. Respondents' counsel have conceded that Petitioner acted

fairly and is not involved in any improper acts or any connivance with the Birrells.

The basis upon which Respondents have sought to invalidate Petitioner's lease is that he paid no money to get it; that the lease contained cancellation provisions authorizing cancellation of Petitioner's interest upon giving him a certain amount of notice and that having taken a lease subject to cancellation and having paid no money to get the lease, Petitioner had no standing to oppose the receivership and has no standing to review the Court's determination ousting him as lessee of the property through the appointment of a receiver.

It is to be noted that Mr. Kelly was appointed receiver of the property, not receiver of Herbert Birrell. No argument has been submitted to show how a mere receiver of a parcel of real estate has power to disaffirm a lease entered into in good faith. How can such action be supported?

REPLY POINT I

Petitioner did not waive the demand for a bond under Rule 65(c) of the Federal Rules of Civil Procedure.

In Point III of their brief, Respondents assert that the demand for a bond on the part of Petitioner is an afterthought not raised in the Court below, for which reason the claimed conflict among the circuits on the interpretation of that rule is immaterial. That contention is not justified. The applicability of Rule 65(c) was argued thoroughly on the hearing before Judge Palmieri. Indeed, Judge Palmieri himself said at page 26 of the transcript of said hearing, the following:

"The Court: Well, it was essential to the decision.

The legal position of the plaintiffs seeking the receivership was much bruited in the case in connection with the application of the rules of civil procedure, and particularly Rule 65 with respect to giving them a bond insofar as the injunctive aspects of relief were concerned; and the court had occasion to refer to Rule 81(a)(1), which provides that these rules do not apply to proceedings in bankruptcy except insofar as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States.

I suggest that you give some attention to that decision because my feeling is that they have a right to seek a receivership."

Furthermore, Respondents' counsel, to support his argument that no bond could be required, referred at page 3 of the transcript, to the case of *Halpert* v. *Engine Air Service*, 212 F. (2) 860 (2nd Circuit)—the correctness of which decision this Court decided to review by granting certiorari (348 U. S. 854 (1954). Unfortunately, as we have mentioned, the parties stipulated to withdraw such application.

It is plain from the foregoing that Judge Palmieri held that Rule 65(c) was inapplicable because Federal Rule 81(a)(1) did not apply to proceedings in bankruptcy. That this view is erroneous has been amply demonstrated, we believe, in our petition.

There thus remains a conflict between the circuits in regard to the applicability of Rule 65(c), as we have set forth more fully at pages 8 to 10 of our petition for

certiorari. The importance of resolving this conflict is manifest; as is also the necessity for settling the legal point as to whether Rule 81(a)(1) applies to this plenary suit.

REPLY POINT II

Petitioner is a real party in interest and has standing, therefore, to review the ruling of the Court below confirming Judge Palmieri's appointment of a Receiver.

At page 4 of their answer, Respondents again repeat their utterly unfounded argument that the lease held by Petitioner can be summarily disregarded by the receiver appointed by Judge Palmieri. To support that claim, Respondents assert (see p. 4 of answer):

> "Petitioner paid no money for a lease to a fourteen story apartment building at 1050 Park Avenue (87th Street) New York City."

The notion that a party taking a lease of real estate must make a money payment to the lessor as consideration for a valid and binding lease is not only legally untenable but entirely irrelevant to the issue raised by this proceeding. As already noted in the petition for certiorari, there was more than ample consideration given by Petitioner herein for the execution of the lease. These included his assumption of the numerous definite and contingent obligations with respect to the operations of the building including the operation of the property, the taxes, wages, materials, supplies, and related items. In addition, Respondent ignores the basic reason for the making of this lease, namely, the effort to increase the rent roll

in a rent-controlled building which increases would determine in part the compensation to be received by the lessee.

To assert that such a lease with mutual obligations on both sides conferred no property right in Petitioner and that, therefore, the receiver could summarily cancel this lease is not only unconvincing but completely without legal warrant.

Of course, Respondents recognize the weakness and fallacy of their argument and therefore do not rest on that alone. They now go on to say that Petitioner was only a stooge and dummy and that since his lessor gave up his apartment in New York and fled to Canada, Petitioner cannot be a *bona fide* obligee. The irrelevancy and unfairness of this type of argument will not be lost on the Court. The fact that Lowell Birrell fled to Rio can have nothing to do with the validity of the lease made by Herbert Birrell with Petitioner. Herbert Birrell is under no charges or indictment. While it is unfortunate from the point of view of Petitioner's position in this litigation that Herbert has seen fit for reasons of his own to remain in Canada, this cannot have a direct bearing on Petitioner's position. This is especially true since it is not even claimed by Respondents that Herbert is holding any assets of the debtor corporation or that he has been directly involved in any conspiracy to divert or conceal assets of the debtor corporations. Petitioner himself is even further removed from any accusation of wrongdoing or impropriety.

As yet, the Respondents are asserting only unproved claims against Lowell Birrell for diversions of assets. Until these claims are proved and they have judgments

against Lowell Birrell they have little standing to assail transactions had, not by the debtor corporations with Herbert Birrell, but between Herbert Birrell and the Petitioner, a completely innocent party, according to the concessions made by Respondents, and one involved in no wrongdoing of any kind.

REPLY POINT III

Respondents still fail to meet the paramount issue in this case which is that by discontinuing their suit against Petitioner and obtaining the appointment of a Receiver, they have deprived Petitioner of any forum or opportunity to try out the merits of this action so far as pertains to Petitioner's lease.

Respondents admit they discontinued their suit against Petitioner; but they allege this was done with Petitioner's consent. It is difficult to understand how Petitioner could have prevented a discontinuance of the suit by Respondents, in view of the specific provisions of Rule 41a of the Rules of Civil Procedure and Rule 21c of the General Rules of the United States District Court, Southern District of New York.

When Respondents presented this discontinuance order they knew that the effect of it was to deprive Petitioner of any forum to litigate the merits of his lease. As matters stand now, there is no such forum. By commencing a suit against Petitioner and then discontinuing against him, and at the same time taking away the property covered by his lease, the Respondents have achieved what they could only get on a complete victory in the lawsuit.

Certainly, this procedure not alone is unprecedented, but on its very face is invalid.

It is to be noted that on the application made by Respondents against Lois B. Morrill, to which reference has been made by Respondents in their appendix, Judge Palmieri, in his opinion granting an injunction against the collection of interest on her mortgages by Mrs. Morrill, specifically provided as follows (app. 30a):

> "The order should provide that the trustees are to commence, within a reasonable time of the filing of the order, an appropriate plenary action that will serve to present for a full trial the issues between Mrs. Morrill and the trustees. Mrs. Morrill may, within a reasonable time after the filing of such action, apply to this Court to have the preliminary injunction vacated, if the trustees have not proceeded with due diligence to secure a speedy trial for the issues in this case. Platt & Munk Co. v. Republic Graphics, Inc., Nos. 27867, 27904, 2d Cir., March 21, 1963; Steelman v. All Continent Corp. 301 U. S. 278, 290 (1937)."

Why was not a similar provision made on the granting of the motion against Petitioner herein, and why was he deprived of "a proper plenary action that will serve to present for a full trial the issues" between him and the Respondent Trustees. This is the very heart of the case and on that the Respondents are completely silent.

REPLY POINT IV

The appointment of a Receiver by the Federal District Court is governed by rules and statute and is not merely a matter of personal discretion on the part of a District Judge.

Under Point I of their brief, Respondents seek to support the appointment of a Receiver by Judge Palmieri on the ground that this involves purely a matter of discretion. The Federal Rules and Statutes which we have discussed in our main application for certiorari clearly established that the appointment of a receiver is more than a matter of personal judgment or discretion. If it were otherwise, then no appointment of a Receiver could ever be reviewed.

Respectfully submitted,

DAVID W. KAHN and
WILLIAM M. KAHN,
Counsel for Petitioner.

ARTHUR D. EMIL,
Co-Counsel for Petitioner.

DAVID W. KAHN,
WILLIAM M. KAHN,
ARTHUR D. EMIL,
LAWRENCE A. KOBRIN,
Of Counsel.

Reply Affidavit of Arthur D. Emil

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 27885

In the Matter

of

SWAN-FINCH OIL CORPORATION, KETA GAS AND OIL COMPANY, SWAN-FINCH PETRO CHEMICAL CORPORATION, Debtors, by GEORGE C. LEVIN and JAMES V. HALLISEY,

Petitioners-Appellees,

AND

PETER JAKOBSON,

Respondent-Appellant.

State of New York
County of New York—ss.:

ARTHUR D. EMIL, being duly sworn, deposes and says:

1. I am the attorney for appellant Peter Jakobson and am fully familiar with all of the facts and circumstances surrounding the above-captioned appeal and the orders below from which the appeal is taken.

2. I make this affidavit in support of appellant's motion for a stay of the Temporary Receiver, pending the hearing and determination of this appeal, and in opposition to the appellees' cross-motion to dismiss this appeal.

3. Briefly stated, it is appellant's position with respect to his motion solely for a stay of certain actions of the Temporary Receiver and the opposing cross-motion to dismiss the entire appeal, that appellees' affidavits are erroneous in several crucial respects:

(a) Appellees have grossly and unfairly summarized the state of the proceedings below. Neither appellant nor his attorney ever consented to the entry of the order appointing the Temporary Receiver. Appellees have sought to confuse the status of the District Court proceedings by treating as equivalent the pending civil action and the pending bankruptcy order.

(b) Appellees have sought to cast doubt upon appellant's standing to appeal from the time that the plenary action below was discontinued. In so arguing, they ignore all proceedings which led to the order from which the appeal pending in this Court is taken.

(c) Appellees seek to misuse the discretionary form of dismissal of appeal in a case clearly beyond the bounds of the normal exercise of this method of appeal administration. They would seek to deny in "summary" fashion any right to appellate review by appellant.

(d) Appellees similarly seek to ignore the substantial questions on appeal raised by the District Judge himself in the course of his original opinion accompanying the first order to which this appeal is directed. Such questions cannot be ignored by a motion to dismiss an appeal.

(e) Appellees would have this Court deny the stay sought by appellant by arguments directed to relief never asked by appellant. Properly viewed, the stay requested is a proper and appropriate form of protecting the right of appellant until this Court makes its determination.

PROCEEDINGS BELOW

4. Both opposing affidavits place great stress on, and there is much underlining with respect to, the fact that the November 30 order was indeed physically typed in my office. The affidavits of Messrs. Hallisey and Kelly tell only part of the story, however.

5. The inexact wording of the order of November 7 prepared by the Trustees for the signature of Judge Palmieri, together with its patent failure even to conform with Judge Palmieri's decision, led to a certain amount of confusion. After the appointment of the Temporary Receiver, several discussions were held since strict compliance with the terms of the order of November 7 would have brought virtually all building management operations by Mr. Jakobson to a complete standstill.

6. At a certain point, after various phrases had been prepared, compared, and discussed, a version of the required words was suggested as conforming the order to the decision. At no time did I, on behalf of the appellant, consent to the order. In fact, in connection with the settlement of the order, I stated in paragraph 3 of my affidavit sworn to November 27, 1962, in commenting on the proposed changes: "Accordingly, respondent [Jakobson] wishes to place upon the record the fact that any

comment included herein in response to the application made by the Trustees shall not be deemed or construed as a consent to the basis of the original order or as a withdrawal of his appeal or otherwise prejudice the pending appeal."

7. At the time the matter came before Judge Palmieri for an informal hearing, on November 27, 1962, I was specifically asked by the Trustees to consent to the new order. I refused. Interestingly enough, I was subsequently informed by Mr. Hallisey that the primary reason that the Temporary Receiver had cancelled my client's lease was that I had refused to consent to the order of November 30.

8. The reason that the order was physically typed on the typewriters of my office was a matter of convenience to both the Court and Mr. Hallisey. At the hearing before Judge Palmieri, I suggested that the new order which Judge Palmieri indicated he would sign should be a complete order rather than one suggested by Mr. Hallisey which would amend the paragraphs by adding and deleting words and paragraphs as suggested in Mr. Hallisey's affidavit in support of his motion for resettlement. Mr. Hallisey said that he did not have the secretarial force available to type the order in that form. I suggested that I could arrange to have the order physically typed since I had more secretaries in my employ than Mr. Hallisey. I also have some recollection that it was at approximately that same time that Messrs. Hallisey and Levin were moving their office to 745 Fifth Avenue. I am rather surprised that counsel would seek to turn a favor done by an attorney against him.

9. To say, therefore, that the appellant's attorney "prepared" the order of November 30 or that it is his "own order" is completely misleading.

10. It is similarly misleading to state, without further explanation, that the order entered by Judge Weinfeld permitting the plenary action to be withdrawn against Jakobson without prejudice was completely consented to by appellant in the Court below. The fact of the matter was that a proposed counter-order was submitted to Judge Weinfeld, together with a memoradum in support of said counter-order. In all likelihood, an appeal will be taken from this order, and Mr. Hallisey was personally so advised on January 3, 1963 at the instant he advised deponent that Judge Weinfeld had signed the order submitted by Mr. Hallisey.

11. In paragraph 6 of Mr. Kelly's affidavit, the statement is made that appellant did not and could not have any valid objection to the appointment of Mr. Kelly as Temporary Receiver for Herbert Birrell. This is completely incorrect. It has always been appellant's position that if a Temporary Receiver is *validly* appointed and if the Temporary Receiver so appointed cancels appellant's lease, this would probably not be reversible since a validly appointed Receiver would step into the shoes of appellant's lessor. This should not be confused with the absence of objection to Mr. Kelly personally as Temporary Receiver if one is validly appointed since Mr. Kelly is a responsible member of the Bar. The appointment of the Temporary Receiver, however, was challenged from the very day a Temporary Receiver was appointed.

12. On page 3 of Mr. Hallisey's affidavit, he claims that I personally admitted that Jakobson was duped and

the Temporary Receiver could cancel the lease. This is a complete misrepresentation of the conversation before Judge Palmieri. I then stated in response to Mr. Hallisey's comment that Jakobson was "duped by Herbert Birrell" that even if it were so, *arguendo*, such a state of affairs would not deprive appellant of the right to seek to maintain his interest in the property. I further stated, as indicated above, and it has always been appellant's position in this matter, that if the Temporary Receiver was *called* appointed, he could probably cancel the lease.

13. One point must be made. The record of this case will show that the first order of Judge Palmieri was served on deponent November 8, 1962. The notice of appeal was filed the very same day. The second order was received in my office December 3, 1962. The notice of appeal was filed December 5, 1962. Surely, this is hardly consistent with any consent whatsoever to the proceedings herein.

STANDING OF APPELLANT

14. The Trustee and Temporary Receiver apparently contend that the discontinuance of the plenary action in the Court below, with respect to appellant deprives appellant of his standing in this Court. Their position completely ignores the fact that the appellant was named as a respondent by the Bankruptcy Court in an Order to Show Cause which led to the appointment of a Temporary Receiver and, even after the modification of the order of appointment, appellant was specifically named in and served with that order.

15. Whatever theoretical rights appellant might be said to have had as of November 20 are certainly confirmed by the subsequent actions of the Temporary Receiver who has now cancelled appellant's lease. The Trustee and Temporary Receiver completely ignore the fact that appellant, in this appeal, contests the very basis of the appointment of any Receiver in this action. Clearly, appellant is sufficiently "aggrieved" by the order of the District Court and the subsequent action of the Temporary Receiver and cannot be entirely deprived of his right to review that action at the appellate level.

16. If appellees' position were to be accepted as a rule of law, then any action ever taken by a Bankruptcy Court in support of a pending plenary civil action could be "insulated" from appellate review by the mere expedhency of discontinuing the plenary action itself once the Bankruptcy Court had asserted and obtained jurisdiction or possession of an asset geographically located within its jurisdiction.

17. Such a procedure, of course, is on its face an effort to maintain a quasi-in-rem action, not permitted under Federal practice. The appellees themselves admit that they have not been able to serve respondent Herbert Birrell. They do not even allege any efforts to obtain some form of substituted service upon him, but seek to cure this omission by long, and essentially irrelevant, recitation of the allegedly nefarious activities of both respondent Herbert Birrell and his brother. They have not served Roby Trading Corp. either directly or through the Secretary of State.

18. Deponent respectfully submits that the recitations are not competent to afford a "summary" disposition of

an appeal by motion to dismiss nor substitute for required jurisdiction and competence in the Court below.

19. Mr. Hallisey fails to report accurately the final position of Judge Palmieri himself with respect to standing. It is true that in granting the first order extending the time within which to file the record, Judge Palmieri made the comment set forth in the memorandum opinion which is part of the record on appeal and which is quoted by Mr. Hallisey on page 6. Subsequently, however, the Judge was asked to fix the contents of the record on appeal. He did so without making any limiting statement. In fact, at that time, the Judge stated orally that appellant could and should not be barred from judicial review of the actions taken below.

20. Even if the Judge had not so stated, it is neither he nor the Trustee who must determine the right to appeal, but this Court alone.

MOTION TO DISMISS APPEAL

21. Deponent also respectfully submits that the relief sought by the appellees in making a motion to dismiss the appeal is not proper. In the Federal courts, dismissal of an appeal is normally restricted to cases where appellants have failed to comply with the various procedural requirements for appeals outlined in Rule 73 or in local rules. Here, appellees seek in effect a summary disposition of the very question with respect to which appellant seeks review by this Court. Deponent respectfully submits that this would not be a proper exercise of the discretionary power given to this Court by the Federal

Rules, to dismiss appeals absent any hearing whatsoever on the merits of the appeal itself.

22. If the papers furnished by the Trustee and the Temporary Receiver demonstrate anything, they clearly show that there is adequate standing on the part of the appellant. Such standing should not be summarily dismissed on the basis of procedural questions.

Merits of Appeal

23. As already noted, it is appellant's contention in this Court that the District Court did not have the power to appoint a Temporary Receiver under the circumstances before him. While it is true that the appointment of a Temporary Receiver is a discretionary act, that discretion is bounded by specific limitations. The Trustee and Temporary Receiver point to the fact that the property is located within the geographical confines of the District Court. That of itself can scarcely be said to give the District Court the right to appoint a Receiver. Similarly, the absence from the jurisdiction of the fee owner of a property does not create any power in the Court below.

24. The opinion below itself pointed to some of the difficulty in connection with the appointment of a Temporary Receiver at the then status of the proceedings. The Trustee and Temporary Receiver have ignored the very legal questions which troubled the District Judge and which must be subject to appellate review. These included (1) the question of the Power of the *Bankruptcy Court* to appoint any Receiver *after* an adjudication, (2) the question of the nature of protection to which appel

lant is entitled under the provisions of the Bankruptcy Act, (3) the question of the appropriateness under State law, to which the Bankruptcy Act requires reference, of the effort to assert jurisdiction over the property on the basis of the facts alleged, and (4) the various other matters outlined in deponent's moving affidavit now before this Court.

25. Certain of the facts as set forth in the affidavits submitted by Messrs. Hallisey and Kelly must not stand without a denial. Jakobson is not an agent or subordinate of Herbert Birrell. The lease which he signed imposes great financial responsibilities upon him, and to claim that he is a simple agent is wrong.

26. The Trustees say that they do not know the exact whereabouts of Herbert Birrell. In a conversation with Mr. Robert Nolan, counsel for Herbert Birrell, on January 11, 1963, I was advised that the Trustees never asked for Birrell's address. Furthermore, the Trustees would have this Court believe that Herbert Birrell refused to meet with the appellees in Canada. Mr. Nolan advised me that this, too, was untrue. A reading of the hearing before Judge Palmieri will indicate that Mr. Levin, one of the co-Trustees, stated "if I could avoid going further into Canada, I would prefer it" (page 55). The Court replied, "Well, I don't blame you. I don't blame you" (page 55). Mr. Levin stated, "It is getting cold up there besides" (page 55). The matter ended there.

27. The Trustees' affidavit states that the Jakobson lease required Jakobson, as lessee, to turn over the remaining income of the building after certain expenses to Herbert Birrell's attorney. This is a complete mis-

statement of the terms of the lease which are before the Court on the appeal and which need not now be spelled out.

28. There are numerous other misstatements, inaccuracies and misinterpretations of testimony before the Court contained in Mr. Hallisey's affidavit. However, they are basically irrelevant in any event and the Court should not be burdened with them at this time.

29. For all of the foregoing reasons, as well as those others outlined in the moving affidavit, it is respectfully submitted that appellant has the standing to appeal the order and has reasonable chances for success on the appeal. The motion to dismiss the appeal must, therefore, be denied and a full opportunity afforded to appellant to present his position and argument to this Court for its determination.

MOTION FOR STAY

30. The Trustees and the Temporary Receiver themselves point to the fact that the property concerned is real property located within the geographical jurisdiction of the Court. Appellant himself is a permanent resident of New York State. Neither he nor the building is likely to vanish from the jurisdiction.

31. In their opposition to appellant's request for a stay, the Trustee and Temporary Receiver have misconceived the extent of the relief requested by this motion. Appellant has not asked (as have appellees) that his appeal be summarily granted and that the Temporary Receiver be ousted forthwith from all jurisdiction over

the property. Instead, appellant has requested that the Temporary Receiver not be permitted to take such action which would render the appeal useless. As set forth in appellant's supporting affidavit, the precipitous interruption of appellant's relationship to the property by the Temporary Receiver—which may well be found to be improper by this Court—would permanently deprive the appellant, and ultimately any party found entitled to the fee ownership, of a substantial economic profit.

32. The gratuitous remark by the Temporary Receiver, who has shown no particular experience in the management of urban residential property, that the property is apparently managed in "normal fashion," wholly ignores the fact presented by appellant's supporting affidavit.

33. Appellant Jakobson has pointed out that in the eight months that he has been operating the property, the rent roll increased more than $24,000. Deponent respectfully submits that such an increase can hardly be considered "normal". It should be noted, too, that even at a conservative capitalization rate of six times the rent roll, the appellant has already created an increased economic value of not less than $144,000 equity in the property. With all due respect to the Temporary Receiver, his assurances that he will himself endeavor to obtain further rent increases cannot be substituted for appellant's professional experience and obvious success with respect to this property.

34. The request for a stay made by appellant is directed solely at the irreparable harm which would result from his proposed termination.

WHEREFORE, it is respectfully submitted that the appellant's motion for a stay of the Temporary Receiver should be granted and the appellees' motion to dismiss the appeal should be denied.

ARTHUR D. EMIL

Sworn to before me this
14 day of January, 1963.

LAWRENCE A. KOBRIN

LAWRENCE A. KOBRIN
Notary Public,
State of New York
No. 31-2161205
Qualified in New York County
Commission Expires March 30, 1963

(SEAL)